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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 73

CHESAPEAKE AND OHIO RAILWAY COMPANY, APPELLANT,

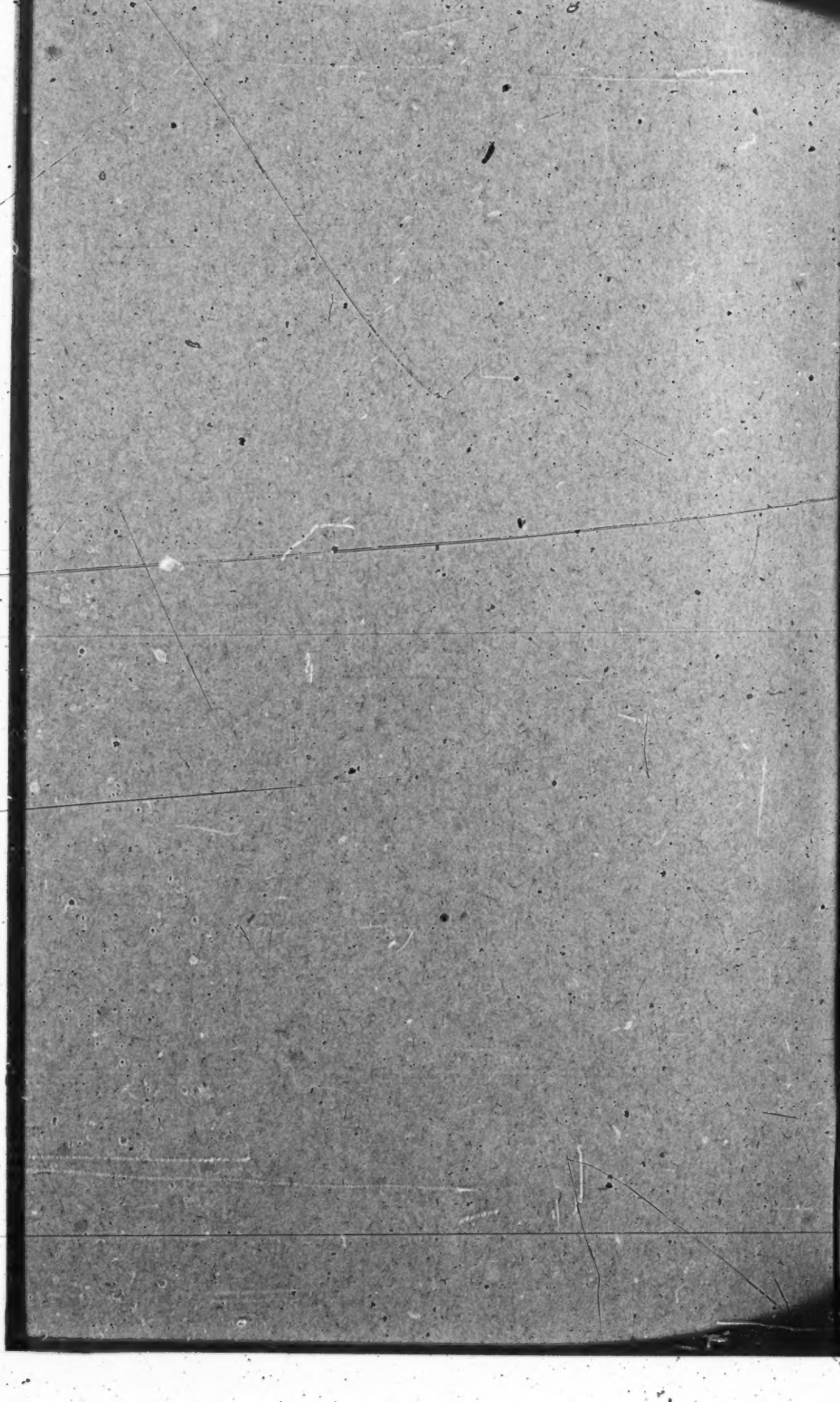
vs.

UNITED STATES OF AMERICA, GUYANDOT AND TUG RIVER RAILROAD COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

FILED APRIL 7, 1930

(34,927)



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[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

In Equity. No. 2379

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Plaintiff,

vs.

UNITED STATES OF AMERICA, GUYANDOT AND TUG RIVER RAILROAD COMPANY, and NORFOLK AND WESTERN RAILWAY COMPANY, Defendants

PETITION—Filed Dec. 8, 1928

To the Honorable Judges of the District Court of the United States for the Southern District of West Virginia, Sitting in Chancery:

The Chesapeake and Ohio Railway Company, hereinafter generally referred to as the "plaintiff", files this its petition against the United States of America, Guyandot and Tug River Railroad Company, and Norfolk and Western [fol. 3] Railway Company, and thereupon respectfully says:

I

The plaintiff is a corporation organized and existing under the laws of the State of Virginia, and a citizen of that State and a resident of the Eastern District thereof, and owns and/or leases and/or operates as a common carrier lines of railroad extending from Old Point in the State of Virginia through and/or into the States of Virginia, West Virginia, Kentucky, Ohio, Indiana, and Illinois, and the District of Columbia, and is engaged in the interstate transportation of persons and property subject to the provisions of the Interstate Commerce Act.

II.

Guyandot and Tug River Railroad Company, hereinafter generally called the "Guyandot", is a corporation organ-

ized and existing under the laws of the State of West Virginia, and a citizen of that State and a resident of the Southern District thereof, and is authorized to own and operate lines of railroad and thereby to engage in interstate commerce subject to the provisions of the Interstate Commerce Act.

Norfolk and Western Railway Company, hereinafter generally called the "Norfolk", is a corporation organized and existing under the laws of the State of Virginia, and a citizen of that State, and a resident of the Western District thereof, and owns and operates lines of railroad extending from the City of Norfolk in the State of Virginia through and/or into the States of Virginia, West Virginia, Kentucky, Maryland, and Ohio, and is engaged in the interstate [fol. 4] transportation of persons and property subject to the provisions of the Interstate Commerce Act.

The Guyandot neither owns nor operates any line of railroad whatever, and its entire capital stock (except directors' qualifying shares) is owned by the Norfolk, which is sometimes herein referred to as the "parent company" of the Guyandot.

III

This is a suit brought pursuant to the provisions of the Urgent Deficiencies Appropriations Act, approved October 22, 1913 (38 Stat. L. 219, 220; Code of Laws of the United States, Title 28, Sections 41 (28), 42-48, inclusive), to enjoin, set aside, annul, suspend, and restrain the enforcement, operation, and execution of so much of a certain certificate and order of the Interstate Commerce Commission, hereinafter generally referred to as the "Commission", issued and entered on July 23, 1928, in Finance Docket No. 5161, which was heard and disposed of together with Finance Docket No. 6067 and Finance Docket No. 4818, and so much of certain other orders subsequently entered in the said proceedings and especially of an order entered therein on November 1, 1928, as authorize the Guyandot to construct and operate a line of railroad from Wharncliffe, West Virginia, to Gilbert, West Virginia; and to enjoin and restrain the Guyandot and the Norfolk, and each of them, from constructing the said line of railroad from

Wharncliffe, West Virginia, to Gilbert, West Virginia, under or in pursuance of the authority or pretended authority of the orders aforesaid. The said orders relate to transportation and were entered upon the petition of the Guyandot and the Norfolk.

[fol. 5]

IV

On May 7, 1925, the plaintiff filed with the Interstate Commerce Commission an application for a certificate of public convenience and necessity for the construction by it of a line of railroad from a point at or near Gilbert, West Virginia, to a point at or near Mullens, West Virginia, and for the extension of its line of railroad known as its Winding Gulf Branch from a point at or near Stone Coal, West Virginia, to a connection with the first-mentioned line at or near Mullens, West Virginia. The said application was duly received by the Commission and docketed as Finance Docket 4818.

On October 29, 1925, the Guyandot filed with the Commission an application, in which the Norfolk and The Virginian Railway Company, hereinafter generally referred to as the "Virginian", joined, for a certificate of public convenience and necessity for the construction and operation of a new line of railroad extending from a connection with the Virginian at or near Elmore, West Virginia, to Gilbert, West Virginia, and thence to Wharncliffe, West Virginia; and the said applicants requested that a hearing upon the application filed by them as aforesaid be had together with the hearing upon the application of the plaintiff hereinabove described. The said application was duly received by the Commission and docketed as Finance Docket No. 5161.

On December 24, 1926, the Guyandot filed with the Commission an amended application, in which the Norfolk, but not the Virginian, joined, for a certificate of public convenience and necessity for the construction of the same line of railroad as that described in its original application, and again requested that a hearing be granted upon said application to be held together with the hearing upon the appli-

[fol. 6] cation of the plaintiff hereinabove described.

On January 21, 1927, the Virginian and Western Railway Company, hereinafter generally referred to as the "Virginian and Western" (but sometimes herein included with the Virginian under the collective designation of the "Virginian"), filed with the Commission an application for the construction of a line of railroad extending from Itmann, West Virginia, to a connection with the Chesapeake at or near Gilbert, West Virginia. The Virginian (by or for which the entire capital stock of the Virginian and Western is held and which is sometimes referred to herein as the "parent company" of the Virginian and Western) joined in said application, upon which the applicants requested a hearing simultaneously with the hearings on the applications of the plaintiff in Finance Docket No. 4818 and the Guyandot and the Norfolk in Finance Docket No. 5161. The said application was duly received by the Commission and docketed as Finance Docket No. 6067.

The plaintiff files herewith, as Exhibit 1, a map showing the portion of Southern West Virginia in which are situated the lines of railroad of the several applicants and/or their parent companies, and further showing the principal streams and mountains of said territory. The entire drainage of said territory is to the west and the streams in West Virginia shown on said map flow to the west and eventually reach the Ohio River.

V

All said applications were filed under Paragraphs 18-20, inclusive, of Section 1 of the Interstate Commerce Act, as amended by Transportation Act, 1920, which paragraphs are in the following terms, namely:

[fol. 7] "(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and

necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

"(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some news-[fol. 8] paper of general circulation in each county in or through which said line of railroad is constructed or operates.

"(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this sec-

tion may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

In the enactment of Transportation Act, 1920, and par- [fol. 9] ticularly of the paragraphs just quoted, and of other laws enacted in the exercise of the power to regulate commerce between the several states, it was the purpose of Congress, as declared by the Supreme Court and heretofore recognized by the Commission, to develop and maintain for the people of the United States an adequate railroad system; and to that end it is recognized by Congress that the preservation of the earning capacity and the conservation of the financial resources of existing individual carriers are matters of national concern; that the unnecessary construction by one carrier of a line of railroad into territory already adequately served by another carrier involves a waste of these resources the burden of which will fall upon the public, and is inimical to the public interest; and that the mere securing to one carrier, by the construction of a new line of railroad, of the right to compete with another carrier, and the mere provision, by such construction, of competitive service for shippers, do not in and of themselves justify a finding of public convenience or necessity in respect of such new construction. And it is further the policy and purpose of the legislation aforesaid to establish the fact that the public interest so protected comprehends, involves, and recognizes the right of an individual carrier to be protected in carrying on and developing its transportation business free from unnecessary and wasteful competition arising from the construction of a line or lines of railroad not required by the present or further public convenience and necessity; and the plaintiff further alleges that it is asserting that right in this suit upon grounds and for reasons hereinafter to be set forth.

[fol. 10] VI

Following the direction of Paragraph 19 of Section 1 of the Interstate Commerce Act, the Commission has prescribed rules and regulations as to hearings and other matters, a copy of which said regulations is herewith filed as Exhibit 2, and is prayed to be taken and read as a part hereof. Pursuant to the said statute and the rules and regulations so prescribed thereunder, notices of the said applications were duly published, and the Commission duly caused notices of each of said applications to be served on, and copies filed with, the Governor of the State of West Virginia, in which State all of the lines of railroad so proposed to be constructed would lie in their entirety, and also caused the questionnaires referred to in the said rules and regulations to be forwarded to, and directed that returns thereto under oath be made by, the several applicants and/or their parent companies in the manner required by said rules and regulations. The said returns to said questionnaires were thereafter duly made, and all of said applicants or their parent companies filed, in each of said proceedings, returns under oath to Questionnaire No. 1 or Questionnaire No. 2, as required by said rules and regulations; and thereafter, as required by law, the Commission ordered that hearings be held upon the application of the plaintiff, the amended application of the Guyandot, and the application of the Virginian and Western and the Virginian. All the said applicants and/or their parent companies, to-wit, the plaintiff, the Guyandot, the Norfolk, the Virginian and Western, and the Virginian, were parties to all the proceedings in which hearings were so directed to be held, and the said applications were heard together in extended public hearings in the City of Washington and District of Co-
[fol. 11] lumbia. Subsequently, briefs were filed for and on behalf of the several applicants and their parent companies. In the course of the said hearings, and without objection from any source, the plaintiff, in order better to serve the public interest, modified its original proposal by asking that it be presently permitted to construct only that part of the line extending from Gilbert to Itmann, and that certain trackage rights be accorded by it to the Virginian and by the Virginian to it; but since the modification so

made (which for the purposes of this suit it is unnecessary to set out more particularly) contemplated and required co-operation by the Virginian, of which there was no assurance, the original application was not withdrawn in whole or in part. On the 14th day of June, 1928, argument was fully heard on all of said applications by Commissioners Woodlock, Porter, and Farrell, sitting as Division Four of the Commission, to which Division the case had been assigned in the regular course of the Commission's business.

VII

On July 23, 1928, the said Division, Commissioner Porter dissenting, filed the report of the Commission and made and entered a certificate and order in said proceedings, whereby the Commission certified that the public convenience and necessity required the construction by the Virginian and Western of the line of railroad described in its application aforesaid (hereinafter sometimes called the "new line") and certified that the present and future public convenience and necessity required the construction by the Guyandot of that part of its proposed line of railroad extending from Gilbert, West Virginia, to Wharncliffe, West [fol. 12] ginia (the said part of said line so authorized to be constructed being sometimes hereinafter referred to as the "proposed line", and being the line the construction of which is herein sought to be enjoined), and denied the application of the Guyandot in all other respects and denied the application of the plaintiff in its entirety. A copy of the said report and certificate and order, including the dissenting expression of Commissioner Porter, is herewith filed as Exhibit 3 and is prayed to be taken and read as a part hereof.

VIII

By the terms of the said certificate and order it was to become effective within thirty days after its date, and on August 17, 1928, the plaintiff filed with the Commission its petition for reconsideration by, and reargument before, the entire Commission of the entire proceedings. Thereafter, the effective date of the certificate and order of July 23, 1928, was postponed from time to time until October 22, 1928, and on October 1, 1928, the Commission denied the

said petition for reconsideration and reargument. On October 17, 1928, the plaintiff filed its further petition for reconsideration and reargument of the certificate and order of July 23, 1928, so far as it granted to the Guyandot a certificate of convenience and necessity for the construction of the line of railroad between Gilbert and Wharncliffe and so far as it failed to grant trackage rights to the plaintiff over the line of the Virginian between Gilbert and Stone Coal. On October 20, 1928, the Commission entered an order further postponing the effective date of the certificate and order of July 23, 1928, to November 22, 1928, except in so far as said certificate and order authorized the Virginian and Western to construct its new line of railroad; and on November 1, 1928, the Commis- [fol. 13] sion entered its further order denying the further petition of the plaintiff for reconsideration and reargument, vacating and setting aside its order of October 20, 1928, so far as it postponed the effective date of the certificate and order of July 23, 1928, and providing that the certificate and order of July 23, 1928, so far as it authorized the Guyandot to construct its line of railroad from Wharncliffe to Gilbert, should take effect and be in force from the date of the order of November 1, 1928. The certificate and order of July 23, 1928, was thus placed in full force and effect as of November 1, 1928.

IX

As appears from the foregoing, all of the three applications so heard and decided by the Commission included within their scope the construction of a line of railroad from a point at or near Gilbert, West Virginia, to a point at or near Itmann, West Virginia. So far as the abovementioned certificate and orders of the Commission authorized the construction of this line, which is the Virginian and Western's new line, by the Virginian and Western, rather than by the plaintiff, said certificate and orders are believed to have been made and entered improperly, and against the weight of the evidence. No complaint, howver, of the authorization of said new line is here made; and the plaintiff alleges, upon information and belief, that the Virginian and Western intends forthwith to construct the said new line, and has already let a contract or con-

tracts for its construction, in whole or in part. It appears from the report of the Commission in these proceedings, and the plaintiff so alleges, that said new line was sought [fol. 14] by the Virginian and Western and authorized by the Commission to be constructed from a connection with the Virginian at or near Itmann to a connection with the line of railroad of the plaintiff extending west from Gilbert and connecting with the main line of the plaintiff at Barboursville on the west (which said line of railroad of the plaintiff is hereinafter sometimes referred to as the Logan Subdivision), so that the plaintiff's Logan Subdivision was thus recognized by the Commission and the Virginian as a connecting line of the Virginian and Western's new line. The said new line and the Logan Subdivision, taken together, will form a continuous line of railroad extending from Itmann on the east to Barboursville on the west, the said line lying wholly in Guyandot Valley, and having throughout grades favorable to the movement of westbound traffic.

It further appears from the report of the Commission that the proposed line of the Guyandot will leave the new line of the Virginian and Western at or near Gilbert, and run thence to Wharncliffe in a general southwesterly direction, with a heavy grade adverse to westbound traffic, over a high range of mountains which separates the Guyandot Valley from the Tug River Valley, in which last-named valley is situated the line of the Norfolk with which the proposed line of the Guyandot would connect; and that the westbound route afforded by said proposed line in connection with the Virginian and Western's new line is seven miles longer than the route afforded by the Logan Subdivision.

It further appears from the report of the Commission that by far the principal traffic which would move over the new line consists of coal originating on the said new line and the lines of the Virginian to the east thereof, which last-mentioned coal is concentrated for through westbound movement at Elmore, a point on the Virginian 2.45 [fol. 15] miles east of Itmann; that by far the principal movement of such traffic will be to the west; and that the only use that can presently be made of the Guyandot's proposed line is to handle westbound traffic from the Virginian

and Western's new line. But it further appears from the report of the Commission that each and every carload of coal that might move to the west from said new line over the Guyandot's proposed line would do so at a cost of at least ninety cents per car over and above the cost of the movement of such car by the Logan Subdivision, exclusive of the cost of interest and maintenance charges upon and of the Guyandot's proposed line, the estimated construction cost of which is Two Million Five Hundred Thousand Dollars ($2,500,000.00); and the plaintiff accordingly alleges, and the report of the Commission clearly and affirmatively shows, that the said Logan Subdivision, so connecting with the Virginian and Western's new line, affords the best, shortest, cheapest, and most economical route for the movement to or from the west of all traffic originating on or destined to the Virginian and Western's new line, and for the movement to the west of traffic originating on the lines of the Virginian to the east of the Virginian and Western's new line, and that the Guyandot's proposed line is an unfavorable, uneconomical, and wasteful route for such movement.

X

So far as the said certificate and order of the Commission dated July 23, 1928, and all subsequent orders of the Commission in said proceedings, including particularly its order dated November 1, 1928, certify, or undertake or purport to certify, that the present or future public convenience and necessity require or will require the construction by the Guyandot and/or the operation by the Guyan- [fol. 16] dot or the Norfolk of the Guyandot's proposed line, the said certificate and orders and each and every one of them are unlawful, void, and of no effect, for the following reasons:

1. The record made before the Commission, upon which the said orders are based, contains no evidence that the present or future public convenience or necessity requires or will require the construction and/or operation of the said line of railroad, or any part thereof; but, on the contrary, the said record clearly and affirmatively shows, and the report of the Commission itself likewise clearly and

affirmatively shows, that the construction and/or operation of the Guyandot's proposed line are and will be contrary to the present and future public convenience and necessity. The only consideration referred to in the report or in the record in this proceeding of a character which might or could tend to establish that public convenience and necessity require the construction of a new line of railroad by the Guyandot was a saving in cost of operation, and the only saving referred to as being rendered possible by any construction by the Guyandot was a saving which that company claimed would result from the construction of its entire line from Itmann to Wharncliffe via Gilbert. This saving, however, was estimated upon the basis of a comparison of the cost of transportation over that line with the cost of transportation by a now existing route formed by the line of the Virginian to Matoaka, a point on a branch line of the Norfolk, whence connection is had over said branch line with the Norfolk's main line many miles east of Wharncliffe, and thence west by the Norfolk's main line, the route so formed being shown by the report of the Commission to be approximately forty-six miles longer than the route by the Virginian and Western's new line and the Guyandot's proposed line. But this saving had no relation to and would [fol. 17] not be effected by the construction of the Guyandot's proposed line, for, as hereinabove shown, the Guyandot's proposd line can be used only for westbound traffic from Gilbert, from which point the only route alternative to that of the proposed line is that afforded by the plaintiff's Logan Subdivision, over which, as appears from the report of the Commission and is hereinabove alleged, transportation is far more economical than by the proposed line. The Commission did not accordingly, make in its report any finding whatever that any saving would result from the construction of the Guyandot's proposed line, but, on the contrary, it expressly found, as hereinabove set forth, that that line afforded a less economical route than that afforded by the line of the plaintiff; nor did the Commission make any other finding of fact on any other subject that would justify or tend to justify a finding of public convenience or necessity. And the plaintiff alleges that, although the dissenting expression of Com-

missioner Porter, which the plaintiff hereby adopts as true in fact, does not contravene in any particular the findings of fact made by the Commission (though in some respects it supplements them), but, on the contrary, relies upon those findings, yet nevertheless the said dissenting expression distinctly and explicitly finds that there was not a scintilla of evidence justifying a finding that the present or future public convenience or necessity requires or will require the construction of the Guyandot's proposed line.

2. The said report of the Commission clearly and affirmatively shows, and the record upon which it purports to be based likewise clearly and affirmatively shows, that the Commission made and entered the certificate and orders herein complained of, and each of them, without authority either in law or in fact, contrary to law, and arbitrarily, in that the said certificate and orders were made and en-
[fol. 18] tered under an erroneous conception and theory of the law applicable in such cases, and in contravention of the Interstate Commerce Act. As hereinabove alleged, no finding of fact is made in support of the said certificate and orders, and the only reasons or purported reasons assigned in support thereof are that the construction of the proposed line would enable the Norfolk to compete with the plaintiff for westbound traffic from the Guyandot Valley, and would assure operators in that territory competitive service to the west. But the plaintiff alleges that these two purported reasons, standing, as they do, alone and unsupported by any fact tending to show public convenience or necessity, are in fact, for the reasons above alleged, reasons against the making and granting of the certificate and orders herein complained of; for while it is manifestly true that the construction of the proposed line would place the Norfolk in physical connection with the new line of the Virginian at or near Gilbert, and would thereby enable it to compete with the plaintiff for westbound business from the Guyandot Valley, it is likewise true, and appears from the report of the Commission, that the Logan Subdivision of the plaintiff is capable of handling far more economically the westbound traffic which the new line could deliver at that point, and the record shows no need on the part of, or request by, any shipper for the competitive service

which the new line would afford. Under these circumstances it is contrary to the theory and purpose of the Transportation Act, as hereinabove set forth, to permit the Norfolk so to compete for traffic for which the line of the plaintiff provides a better and cheaper route, and to provide for operators in the Guyandot Valley a competitive service which they do not need and have not requested; [fol. 19] and in this connection the plaintiff again refers to and repeats the declaration in the dissenting expression of Commissioner Porter, made upon the same state of facts as those found by the Commission, that the certificate and orders complained of are based upon an unsound and erroneous theory of the law; and for these reasons the Commission, in making and entering said certificate and orders, did so without authority of law, contrary to law, and arbitrarily.

XI

In the course of the hearing held upon the applications hereinabove set out, the duly constituted representatives of the Guyandot announced, and the plaintiff thereupon alleges upon information and belief, that the Guyandot intends, unless restrained therefrom by this Honorable Court, to construct its proposed line, and that it, the Guyandot, or its parent company, the Norfolk, will thereafter operate the same as a part of the railroad system of the Norfolk.

XII

The plaintiff further alleges that for the reasons hereinabove set forth, the construction of the Guyandot's proposed line not only would be contrary to the public interest in that it would impose upon the public and upon the national transportation system great and wholly unnecessary transportation and carrying charges, but also that to the extent that the line might be used by the public for the transportation of westbound traffic, which is the only pretended justification for its construction, its construction and operation would inflict upon the plaintiff in particular an irreparable injury by the diversion from the plaintiff's [fol. 20] lines of railroad of traffic which could and would move thereover more naturally and more economically than by any other route, and which accordingly should

move thereover both in the public interest and in the interest of the plaintiff, and that said construction and operation would accordingly violate the rights of the plaintiff as hereinabove set forth; and the plaintiff alleges that the loss occasioned to it thereby would amount annually to many thousands of dollars, and would be (in case one-half of the traffic moving west from Gilbert moved over the proposed line, as suggested by the Norfolk in the record) at least the sum of Four Hundred and Fifty Thousand Dollars ($450,000) during the first year of operation of the Virginian's new line, and that this loss would progressively increase annually with the increase of the business originating upon, or moving to the west over, the Virginian and Western's new line to Gilbert, and thence over the Guyandot's proposed line.

In consideration whereof, and forasmuch as the plaintiff is without remedy save in a court of equity, where matters of this kind are properly relievable and cognizable, the plaintiff prays that a preliminary or interlocutory order and injunction be entered herein restraining and suspending until the final determination of this cause, the enforcement, operation and execution of such part or parts of the certificate and order of the Commission made and entered July 23, 1928, in Finance Dockets Nos 4818, 5161, and 6067, and of all subsequent orders made and entered in said proceedings, as authorize the Guyandot and Tug River Railroad Company to construct and operate a line of railroad from Gilbert, West Virginia, to Wharncliffe, West Virginia; and that upon final hearing herein a decree be entered perpetually enjoining, suspending, annulling, and setting aside the enforcement, operation, and execu- [fol. 21] tion of said part or parts of the said certificate and orders; and that a preliminary or interlocutory order and injunction be entered restraining and enjoining the Guyandot and Tug River Railroad Company and the Norfolk and Western Railway Company, and each of them, and all and singular the officers, agents, and employees of them, and of each of them, from constructing the said line of railroad between Gilbert, West Virginia, and Wharncliffe, West Virginia, or any part of the said line of railroad, and from taking any proceedings, and from doing any other acts or things under and pursuant to the afore-

said certificate and orders of the Commission, or any of them; and that upon final hearing a decree be entered perpetually enjoining the said defendants, and each of them, and their officers, agents, and employees in the respects hereinabove set forth.

And the plaintiff further prays for such other, further and general relief in the premises as the nature of this case shall require and to equity shall seem meet, and that Your Honors will direct that proper writs of subpoena be issued any that a copy of this petition be forthwith served upon each of the defendants herein named in the manner provided by law; and the plaintiff will ever pray, etc.

Herbert Fitzpatrick, Robert B. Tunstall, Geo. H. Gardner, Thomas L. Preston, Fitzpatrick, Brown & Davis, Solicitors for the Plaintiff.

[fol. 22] *Duly sworn to by R. S. Marshall. Jurat omitted in printing.*

(Here follows Exhibit 1, side folio 24)

[fol. 23] EXHIBIT 2 TO PETITION

INTERSTATE COMMERCE COMMISSION, WASHINGTON

Order

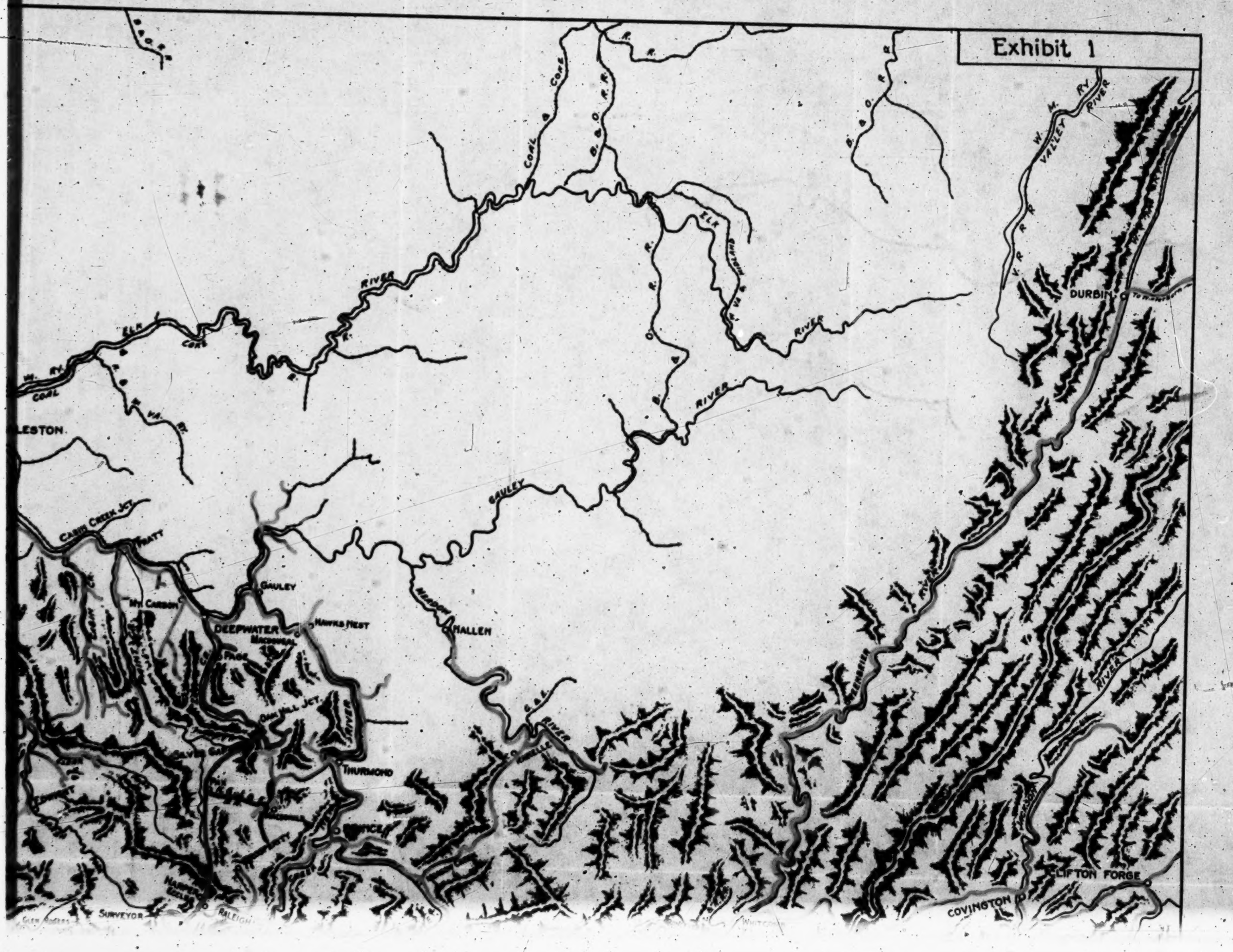
At a session of the Interstate Commerce Commission, Division 4, held at its office, in Washington, D. C., on the 22nd day of January, A. D. 1924.

In the Matter of Applications Under Paragraphs (18) to (21), Inclusive, Section 1, of the Interstate Commerce Act for Certificates of Public Convenience and Necessity for the Construction or Extension of Lines of Railroad, and Applications under Paragraph (18), Section 15a, of said Act for Permission to Retain the Excess Earnings of Newly Constructed Lines of Railroad

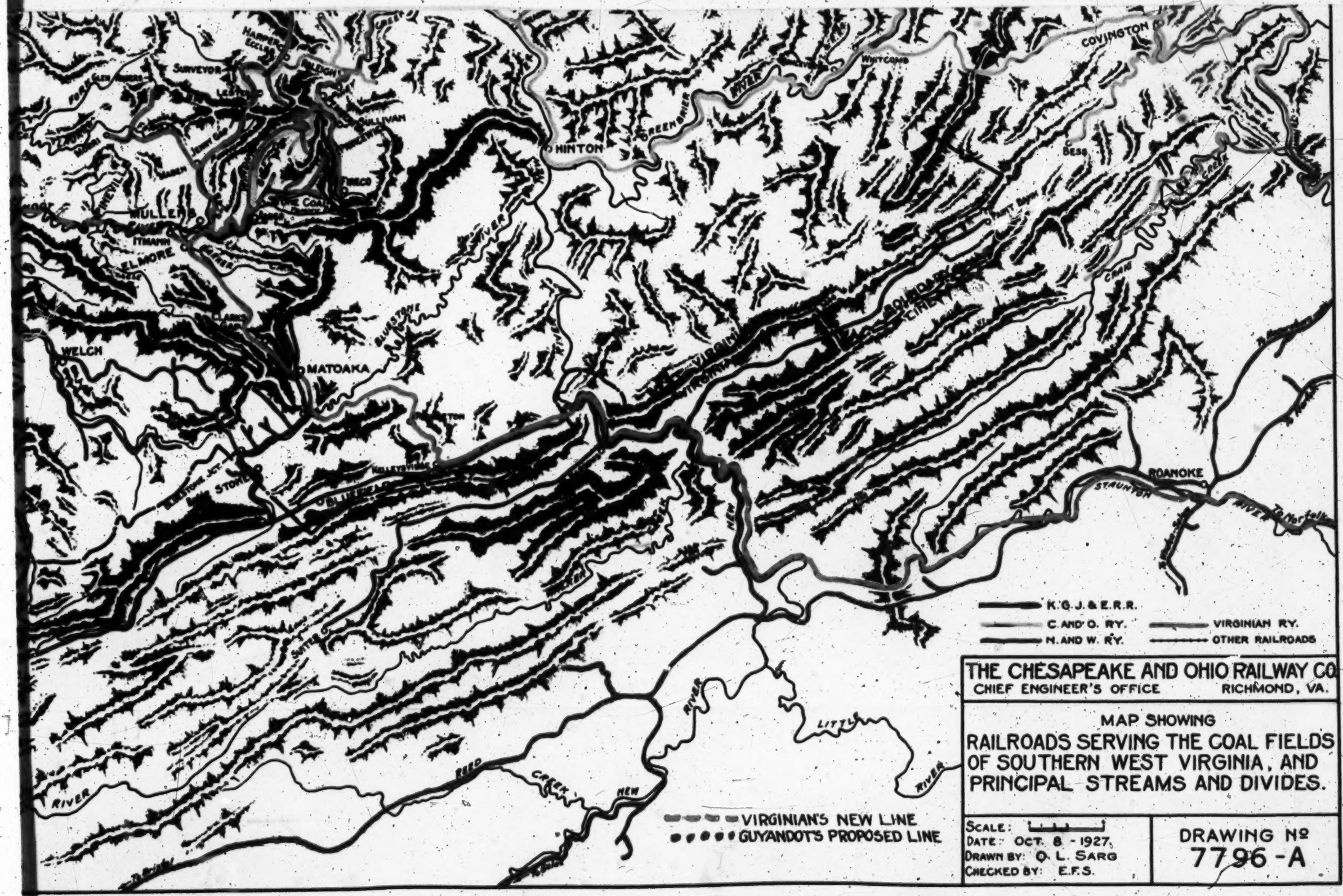
The matter of applications under the above title being under consideration:

PORTSMOUTH
OHIO
Cincinnati
B. & O. R. R.
C. T. & L. RY.
O. R. R.
N. & W. RY.
B. & O. R. R.
B. & O. R.
KANAWHA
RIVER
TYGART CREEK
SANDY RIVER
RUSSELL
IRONTON
RIVER
ASHLAND
OHIO
CATLETTSBURG
KANAWHA RIVER
ELK
COAL
Louisville
LITTLE SANDY
BIG SANDY JCT.
KENOVA
HUNTINGTON
BARBOURSVILLE
RIVER
ST. ALBANS
MICHIGAN RY.
K. & W. VA. RY.
COAL
CHARLESTON
W. VA. RY.
RIVER
COAL
SPROUL
CABIN CREEK JCT.
TRATT
BIG
COAL
RIVER
MT. CARBON
DEEPWAT
MADISON
BLAINE
CREEK
FORK
PAINT
CREEK
LOGAN
PLUM CREEK
SHERIDAN
POND
FORK
BALD KNOB
EDWIGHT
SALVIS GAP
NAUBATUCK
KENTUCKY
WEST VIRGINIA
HARPER
ECCLES
FORKS

Exhibit 1


B. & O. R.R.
COAL
RIVER
ELK
W. VA. RY.
R.
CHESTER & ELK RIVER R.R.
W. VA. RY.
VALLEY
RIVER
V. R. R.
DURBIN
GAULEY
CABIN CREEK JCT.
MT. CARBON
DEEPWATER
HAWKS NEST
MACDONALD
PAGE
THURMOND
MEADOW
MALLEN
NEW
GAULEY
RIVER
SURVEYOR
RALEIGH
COVINGTON
CLIFTON FORGE

NAUGATUCK
WILLIAMSON
STIRRAT
THREE FORKS
SURVIVOR
GILBERT
BAILEYSVILLE
MULLENS
ELMORE
WELCH
MARTIN
SHELBY
BOUNDARY LINE
KENTUCKY
VIRGINIA
ELKHORN CITY
ELKHORN CREEK
GRUNDY
RIVER
NORTH FORK OF KENTUCKY RIVER
L. & N. R.R.
POUND
CLINCHFIELD
SANDY RIVER
GUEST RIVER
CLINCH
POWELL RIVER
NORTON
HOLSTON
STONE JCT.
STONE COAL



THE CHESAPEAKE AND OHIO RAILWAY CO
CHIEF ENGINEER'S OFFICE RICHMOND, VA.

MAP SHOWING
RAILROADS SERVING THE COAL FIELDS OF SOUTHERN WEST VIRGINIA, AND PRINCIPAL STREAMS AND DIVIDES.

SCALE:
DATE: OCT. 8 - 1927.
DRAWN BY: O. L. SARG
CHECKED BY: E.F.S.

DRAWING Nº
7796 - A

It is ordered, That such applications shall set forth the following information:

(a) Exact corporate name of the applicant.

(b) Whether the applicant is (1) a carrier by railroad subject to the interstate commerce act, or (2) a corporation organized to construct and operate a railroad but not an operating corporation.

(c) Whether it is proposed to construct (1) a new line of railroad or (2) an extension of an existing line of railroad.

[fol. 25] (a) Applicant's general plans for financing the proposed construction, and applicant's relation, if any, traffic or financial, to any other operating or nonoperating railroad corporation or corporations.

(e) Whether permission is desired to retain the excess earnings derived from such new line of railroad or extension.

(f) The reasons, briefly stated, why the present or future public convenience and necessity require or will require the proposed construction. (Detailed reasons are to be reserved for the return to the questionnaire hereto annexed.)

(g) Name, title and post office address of counsel or official to whom correspondence in regard to application is to be addressed.

(h) Date of incorporation, and government, state or territory, under the laws of which the applicant was organized. If incorporated under the laws of, or authorized to operate in, several states, give the facts in regard thereto.

(i) Reference to action by stockholders or directors of the applicant authorizing the making and filing of the application, giving date and place of meeting.

(j) Each state, and each county in such state, in which the proposed new line of railroad or extension will be situated.

(k) The route and termini of the proposed new line of railroad or extension, giving the name of each incorporated city or village through which such line or extension will pass.

[fol. 26] (l) The total number of miles of main track of the proposed new line of railroad or extension, and of each branch thereof.

(m) Whether the applicant desires a hearing upon the application.

(n) The application and each copy thereof shall be accompanied by a map drawn to scale. There shall also be furnished with the marginal application, but not incorporated therein, one tracing of such map on tracing linen. The purpose of this map is (a) to define the route of the proposed line, so that it may be properly described and readily traced on another map; (b) to show fully the geographic situation of the proposed line and its relation to existing railroad lines; and (c) to show, so far as limitations admit, other geographic facts pertinent to a consideration of the case. Towns, villages, large rivers or lakes, national parks and reservations should be shown, at least near the route. To orient the proposed line, a sufficient area should be covered, showing all common carrier railroads therein, and other data of recognized importance, such as large cities, important railroad centers, state boundary lines, etc. The limits of the area, which the applicant claims would be served, should be shown when possible. The map and each copy thereof shall be on a sheet 8 x 10½ inches, or a multiple of that size not larger than 16 x 21 inches, and folded to dimension. The proposed line should be shown in clear relief on the prints by color or otherwise.

It is further ordered, That the following procedure shall [fol. 27] govern the execution, filing, and subsequent disposal of the application:

The original application shall be signed by an executive officer of the applicant having knowledge of the matters and things therein set forth, shall be verified under oath, and shall show, among other things, that the affiant has knowledge of the matters and things therein stated and is

duly authorized by the applicant to verify and file the application.

The original application and nine copies for the use of the Commission, and two additional copies for each state in which will be situated any part of the proposed new line of railroad or extension, shall be filed with the Secretary of the Commission, Washington, D. C. Each copy shall bear the dates and signatures that appear in the original and shall be complete in itself; the signatures in the copies may be stamped or typed, and the notarial seal may be omitted. Additional copies shall be furnished as directed by the Commission.

Upon receipt of the application, the Commission will: (a) serve notice thereof on, and file a copy thereof with, the governor and public service commission of each state in which any part of the proposed new line of railroad or extension will be situated, accompanied by an inquiry as to whether the governor or other representative of the state desires to be heard in the matter; (b) transmit to the applicant the questionnaire attached hereto and made a part hereof; together with a notice of the filing of the application, which notice shall be published by the applicant at least once during each of three consecutive weeks in some newspaper of general circulation in each county, in which any part of the proposed new line of railroad or extension will be situated; (c) transmit to such carriers serving the same general territory, as the Commission may [fol. 28] determine, the questionnaire No. 2 hereto attached and made a part hereof, together with a copy of the application. Any carrier to which a copy of questionnaire No. 2 is sent shall, through its proper official having knowledge of the facts, make full and complete answer thereto, under oath.

The returns to the several questionnaires shall be filed with the Commission as soon as practicable, but not later than six weeks after receipt thereof. Action will not be taken on the application, and a hearing theron, if considered necessary by the Commission, will not be ordered until after the return to the questionnaire sent to the applicant shall have been received, satisfactorily completed in the manner provided.

The Commission will mail a copy of the returns to the several questionnaires to each governor and public service

commission to whom a copy of the application was sent, and will mail a copy of the returns to questionnaire No. 2 to the applicant. The persons signing the returns to the several questionnaires, or such other representatives of the parties as the Commission may designate, shall, if so requested by the Commission, appear at any hearing that may be held and subject themselves to examination and cross-examination.

It is further ordered, That the application and the return to the questionnaire shall be prepared in typewritten or printed form on paper approximately 8½ inches by 11 inches, with 1½-inch margin at the left side for binding, except as to maps, drawings, etc., which shall conform to the requirements above stated.

It is further ordered, That all previous orders in conflict herewith be, and they are hereby, cancelled.

By the Commission, Division 4.

George B. McGinty, Secretary. (Seal.)

[fol. 29] Interstate Commerce Commission

Questionnaire No. 1

In the Matter of Applications under Paragraphs (18) to (21), Section 1, of the Interstate Commerce Act for Certificates of Public Convenience and Necessity for the Construction or Extension of Lines of Railroad, and Application under Paragraph (18), Section 15a, of said act for Permission to Retain the Excess Earnings of Newly Constructed Lines of Railroad.

General Instructions

Responses to all questions and requirements of the questionnaire shall be full and complete in every particular. Responses of a general nature will not be acceptable. For estimates and opinions the supporting data shall be given. Information not specifically requested but which may be helpful to the Commission in reaching correct conclusions should be supplied in detail.

In the return to the questionnaire the questions must appear before the answers thereto and must be numbered and lettered as indicated in the questionnaire hereto an-

nexed. Each copy of the return shall bear the dates and signatures that appear in the original and shall be complete in itself; the signatures in the copy may be stamped or typed and the notarial seal may be omitted. Statement of the same facts in answer to two or more questions should generally be avoided, suitable reference being made where necessary.

The original return and nine copies for the use of the Commission, and two additional copies for each state in which any part of the proposed new line of railroad or extension will be situated, shall be filed with the Secretary of the Commission, Washington, D. C.

[fol. 30] The term "new line of railroad", as used herein, means either a proposed new line of railroad or a proposed extension or branch of an existing line of railroad.

Return to Questionnaire

The —— Company, having made application to the Interstate Commerce Commission, under paragraph (18) of section 1 of the interstate commerce act, for (Here state in detail the nature of application.) (Insert following if appropriate:) "and, under paragraph (18), of section 15a of the interstate commerce act, as amended, for permission to retain the excess earnings derived from such newly constructed line of railroad") which application is filed in the office of the Commission in Finance Docket No. —, hereby affirms that notice of the application has been published in the form prescribed by the Commission, at least once during each of three consecutive weeks, in the following newspapers:

——, Beginning —— —, ——.
——, Beginning —— —, ——.
——, Beginning —— —, ——.

[fol. 31] that said newspapers are of general circulation in each of the following counties of the states named:

(State:) ——; (Counties:) ——.
(State:) ——; (Counties:) ——.

Which are all of the states and counties in which the proposed new line of railroad will be situated; and that the

newspaper clippings hereto attached contain true copies of the notice as published in said newspapers. The applicant also submits the following information required by the Commission:

The applicant will here state:

1. The essential facts relied upon to support the statement that the applicant is a carrier by railroad, engaged in the transportation of passengers or property, subject to interstate commerce act, or is a corporation organized to construct and operate a railroad.

2. Whether the proposed new line of railroad will be both constructed and operated by the applicant.

3. Whether or not any corporation, individual, or trustee, holds control over the applicant at the date of filing this return. If control is so held:

(a) The form of control, whether sole or joint, and whether in trust.

[fol. 32] (b) The name and business address of the controlling corporation, individual, or trustee.

(c) The manner in which control was established.

(d) The extent of control.

(e) Whether control is direct or indirect.

(f) The name and business address of the intermediary through which control, if indirect, was established and is exercised.

(g) The name and business address of the beneficiaries, for whom the trust, if any, is maintained.

(h) The purposes of the trust.

4. Whether the applicant is connected by common stock ownership, or otherwise, with any industry to be served by the proposed line. If so, state the facts.

5. Amount and kind of capital stock (a) authorized, and (b) issued, for construction of the proposed line.

6. The chief purposes and functions of the proposed line.

7. The classes of service to be performed, as passenger, freight, express, and switching.

8. The kind of motive power to be used. If electric power, state source and estimated cost.

9. Whether the proposed line will receive material revenue from the territory traversed, or serve any material public convenience and necessity of the local territory. If the answer is "no", the applicant may elect to omit answers to questions 10 to 21, inclusive.

[fol. 33] 10. The name and population of each county in which the proposed new line of railroad will be situated, and the name and population of each city, town and village at which a station will be established, together with its distance from a designated initial point, with the source of information as to population.

11. The names of places mentioned in paragraph 10 that are now served by common carriers, (excluding street railways), and the name of each common carrier serving the several places.

12. The names of the places mentioned in paragraph 10 that have no common carrier service, giving the distance in miles of each such place from the nearest station on a common carrier, together with the name of each such carrier, and the character of the connecting highway.

13. The name and population of each city, town and village (together with state and county in which located), having a population of 200 or more and lying within 10 miles of the proposed new line of railroad, but not entered thereby.

14. The approximate distance in miles by highway from the nearest station on the proposed new line of railroad to each of the places enumerated in paragraph 13, and the names of all common carriers, if any, now serving each.

15. The names of other common carriers with which the proposed new line of railroad will connect, and the proposed points of track connection.

16. The general topography of the country through which the proposed new line of railroad will extend, indicating whether level, rolling, mountainous, cultivated, [fol. 34] pasture, prairie, desert, rocky, timbered, or underlaid with minerals.

17. The approximate area of the territory to be served, an estimate of the population therein, and of the area.

(1) in timber,
(2) in pasture, and
(3) under cultivation.

(See General Instructions.)

18. The kinds of industry carried on in the area to be served, such for example, as farming, dairying, grazing, coal mining, manufacturing, lumbering, etc., and the relative importance of each.

19. The main facts as to the age, growth and extent of such industries, their probable future growth and permanence and the reasons therefor.

20. What carriers now serve these industries, and to what extent.

21. Whether the chief support of the proposed new line of railroad will come from the general community or from some particular industry or industries, located or to be located. In the latter case give facts concerning such particular industry or industries and applicant's contractual or financial relation thereto.

22. Whether the proposed new line of railroad will be built primarily for a direct profit from railway operation, or for the advantage of any other industry or business. If for the latter, state what industry or business will be so benefited, what such advantages will be, and the applicant's contractual or financial relation to such industry or business.

[fol. 35] 23. If the proposed new line of railroad is an extension of an existing railroad, branch, connecting track or

cutoff, in so far as not fully set forth under paragraphs 21 and 22, the extent to which it is expected to be directly profitable in itself, and the extent to which it is expected to be justified by its effect on the business of the existing line.

24. If the proposed new line of railroad is to be a connecting link between existing railroads, the kind and volume of traffic, expressed in tons or carloads, that probably will be interchanged.

25. What economies will be effected by such interchange of traffic.

26. Of the interchange traffic mentioned in answer to paragraph 24, what part, expressed in tons or carloads, cannot be hauled or moved between common points by existing railroads.

27. The facts as to any agreement, tentative or otherwise, with existing carriers, covering operation of the proposed line, interchange of traffic, division of rates, or trackage rights.

28. Whether any aid, gift, grant of right of way, or other donation has been promised in connection with the proposed new line of railroad, and if so, the names of all persons, natural or artificial, giving such aid, gift, grant of right of way, or other donation, with a statement of the nature and value thereof.

29. The manner in which it is proposed to finance construction and equipment, the kind and amount of securities to be issued, and the approximate terms of their sale; to what extent funds for financing are now available, and which, if any, of such securities will be underwritten by in- [fol. 36] dustries to be served by the proposed line.

30. An estimate, in detail, of the character and volume of traffic expected and the gross revenue to be derived therefrom, covering each of the first five years following the completion of the proposed new line of railroad, together with an estimate of the annual revenues expected after the first five years. The detailed estimate required for the first five years should show the amount of each class of traffic, the mean length of haul, the rate per unit, and the revenue

to be derived. Chief points or territories of origin and chief points or territories of destination of traffic.

31. The estimated total gross revenue, operating expenses, net revenue and net railway operating income, corresponding with the estimates of traffic under paragraph 30. By "net railway operating income" is meant the excess of the credits over the debits to income, as reflected by the operating revenue, operating expense, railway tax accrual, uncollectible railway revenue, equipment rent, and joint facilities rent accounts.

32. The part of the estimated traffic which will constitute net additional business developed or created by the construction of the proposed new line of railroad, and the part that will be diverted from existing railroads.

33. The particular mining, timbering, manufacturing or other enterprises to be established contingent on the construction of the proposed new line of railroad and applicant's contractual or financial relation thereto. The tonnage or number of cars of freight expected from such enterprises.

[fol. 37] 34. The dates on which it is expected to begin and to complete the construction of the proposed new line of railroad.

35. The engineering work in full detail which has been done with respect to the proposed line at the time of filing the return.

36. The following particulars as to the physical characteristics of the proposed new line of railroad:

(a) The number of main line tracks.

(b) Weight of rail for main line track.

(c) Rate of maximum grade in each direction, and whether and how compensated for curvature.

(d) Rate of limiting grade that will fix train loading in each direction, and whether and how compensated for curvature.

(e) If helper grades are to be used, the number, rate, length and location of each.

(f) The maximum rate of curve.

(g) The average amount of curvature per mile, in degrees.

(h) The approximate length and height of wooden trestles or other temporary construction.

(Details under this paragraph not fixed by survey are to be estimated from reconnaissances so far as possible.)

37. An estimate of total increase in charges to road and equipment account during the first five (5) years after completion of the line. If this displaces rental charges on equipment, so show.

[fol. 38] 38. Any additional facts or reasons to show that the public convenience and necessity require the construction of the proposed line.

Exhibits Required

There shall be filed with the return to the questionnaire the following exhibits: (copies of return need not contain any exhibits except E and F).

A. A copy of the engineering report of reconnaissance if records of location surveys are not submitted.

B. A copy of the specifications as to construction, if any exist.

C. A map of the actual staked or projected location, if such location has been made, showing the alignment in detail, together with the usual topographic features, including roads, streams, canals, railroads, cities, towns, villages, state and other governmental boundary lines. A small scale is preferable; but not required. Small maps may be folded accordeon fashion to conform to the size of the return. If more than 12 feet long it should be submitted in a continuous roll.

D. A copy of the most complete and authoritative available profile of the location of the proposed new line of railroad. If more than twelve feet long submit in a continuous roll, otherwise fold to the size of the return.

E. (1) A detailed estimate of the cost of building the proposed new line of railroad, with all the necessary appurtenances (except equipment), classified by Interstate Commerce Commission primary accounts; also a concise detail of estimated quantities and prices covering what is [fol. 39] set down under Accounts 3 to 12, inclusive. Details may be required for other principal accounts. A complete estimate showing quantities and prices in reasonable detail may be submitted in any form.

(2) Detailed estimates of the kind and cost (or rental cost) of the equipment required to handle the estimated traffic separately for the first and the fifth years of complete operation. State whether the equipment is to be bought or rented; show second-hand equipment as such; give number of units, class of service and general type, with the weight and tractive power of locomotives and capacity of freight cars.

F. If the applicant is a going concern, copies of the income account for the five preceding calendar years and for the months of the current year for which the figures are available; also copies of the latest profit and loss account and general balance sheet.

G. Opinion of counsel that the proposed construction is within the charter powers of the applicant.

Oath

State of ——,
County of ——, ss:

(Name of affiant:) —— ——, makes oath and says that he is the (Title of affiant:) —— of the (Corporate name of applicant;) —— ——, applicant herein; that he has been authorized by proper corporate action on the part of said [fol. 40] applicant to verify and file with the Interstate Commerce Commission the foregoing return to questionnaire of said Commission in respect of the application in Finance Docket No. —; that he has carefully examined all of the statements referred to in said return and the exhibits attached thereto and made a part hereof; that he has knowledge of the matters set forth in such return and that all such statements made and the matters set forth therein

are true and correct to the best of his knowledge, information and belief.

——, ——.

Subscribed and sworn to before me, —— in and for the State and County above named, this — day of ——, 192-. My commission expires —— —, ——. —— ——. (Seal.)

[fol. 41] Interstate Commerce Commission, Washington

——, 192-.

To —— ——:

You are hereby notified that on the — day of ——, 192-, the —— filed an application for a certificate of public convenience and necessity authorizing it to ——, which application is recorded under Finance Docket No. —. A copy of the application is enclosed.

There is transmitted herewith a form of questionnaire to be filled out and returned by respondent as early as practicable, but not later than six weeks after receipt thereof, in accordance with the order of the Commission entered January 22, 1924, providing that any carrier to which a copy of questionnaire No. 2 is sent shall, through its proper official having knowledge of the facts, make full and complete answer thereto, under oath.

Director, Bureau of Finance.

[fol. 42] Interstate Commerce Commission

Questionnaire No. 2

In the Matter of Applications under Paragraphs (18) to (21), Section 1, of the Interstate Commerce Act for Certificates of Public Convenience and Necessity for the Construction or Extension of Lines of Railroad, and Applications Under Paragraph (18), Section 15a, of said Act for Permission to Retain the Excess Earnings of Newly Constructed Lines of Railroad

General Instructions

Responses to all questions and requirements of the questionnaire shall be full and complete in every particular.

Responses of a general nature will not be acceptable. For estimates and opinions the supporting facts and data shall be given. Information not specifically requested but which may be helpful to the Commission in reaching correct conclusions should be supplied in detail.

In the return to the questionnaire the questions must appear before the answers thereto and must be numbered and lettered as indicated in the questionnaire hereto annexed. Each copy of the return shall bear the dates and signatures that appear in the original and shall be complete in itself; the signatures in the copy may be stamped or typed and the notarial seal may be omitted.

The original return and seven copies for the use of the Commission, and two additional copies for each state in which any part of the proposed new line of railroad or extension will be situated, shall be filed with the Secretary of the Commission, Washington, D. C.

[fol. 43] 1. Has respondent any financial interest, direct or indirect, in the construction or operation of the proposed line?

2. If the proposed line would connect with respondent's railroad state the terms of any agreement or understanding respondent may have with the applicant concerning interchange of traffic, division of rates, or trackage rights.

3. Give respondent's opinion of the correctness of the reasons stated by the applicant why the public convenience and necessity require the construction of the proposed line, and state respondent's view of the manner in which the public interest would be affected.

4. Give available information concerning the character and extent of the industries, and the resources of the area that the proposed line would serve locally.

5. What would be the effect of its operation on the area locally served?

6. What would be its utility as a through or connecting carrier?

7. What service would it perform that cannot now be performed by existing carriers? How far would its functions be competitive?

8. What would be the nature of its probable traffic? Would the traffic be sufficient to justify the proposed construction?

9. How would the proposed construction affect the traffic and income of respondent, and its ability to serve the public?

10. State any other matters deemed relevant.

11. When the case may involve a comparison with re-
[fol. 44] spondent's line as to economy of operation, it is requested that respondent furnish a grade profile of the part of its line in question. If such a profile is not available give a statement of the ruling grades governing train loading in each direction.

12. What is respondent's attitude toward the construction of the proposed line by the applicant? Does respondent desire a hearing?

[fol. 45] EXHIBIT 3 TO PETITION

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 6067[1]

Construction of Line by Virginia & Western Ry. Co.

Submitted June 14, 1928. Decided July 23, 1928

1. Certificate issued authorizing the Virginian & Western Railway Company to construct a line of railroad in Wyoming and Mingo Counties, W. Va.

2. Certificate issued authorizing the Guyandot & Tug River Railroad Company to construct that part of its pro-

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[1] This report also embraces Finance Docket No. 4818, Application of Chesapeake & Ohio Railway Company for Authority to Construct Lines of Railroad in Mingo, Wyoming and Raleigh Counties, W. Va., and Finance Docket No. 5161, Application of Guyandot & Tug River Railroad Company for Authority to Construct a Line of Railroad in Wyoming and Mingo Counties, W. Va.

posed line extending from Gilbert to Wharncliffe, in Wyoming and Mingo Counties, W. Va. Application in Finance Docket No. 5161 denied as to all other matters.

3. Present and future public convenience and necessity not shown to require the construction by the Chesapeake & Ohio Railway Company of lines of railroad in Mingo, Wyoming and Raleigh Counties, W. Va. Application in Finance Docket No. 4818 denied.

E. W. Knight and W. H. T. Loyall for Virginian & West-
[fol. 46] ern Railway Company and Virginian Railway Company.

Theodore W. Reath and D. Lynch Younger for Norfolk & Western Railway Company and Guyandot & Tug River Railroad Company.

Robert Tunstall and George H. Gardner for Chesapeake & Ohio Railway Company.

H. E. DeJarnette for Princeton Chamber of Commerce.

R. D. Bailey for county court and citizens of Wyoming County.

Report of the Commission, Division 4

Commissioners Woodlock, Porter, and Farrell

By DIVISION 4:

Exceptions were filed to the report proposed by the Examiner and the cases were argued orally.

On May 7, 1925, the Chesapeake & Ohio Railway Company filed its application in Finance Docket No. 4818 for a certificate that the present and future public convenience and necessity require the construction by it of (a) an extension of its line of railroad, known as the Logan subdivision, from the southern terminus of said division, at or near Gilbert, easterly to a point at or near Mullens, a distance of 47.3 miles, in Mingo and Wyoming Counties, W. Va.; and (b) an extension of its Winding Gulf branch from its southern terminus at or near Stone Coal, westerly to a point at or near Mullens, 8.2 miles, in Raleigh and Wyoming Counties. Permission was also requested under paragraph (18) of section 15a of the act to retain the excess earnings from the

[fol. 47] proposed extensions. On October 29, 1925, the Guyandot & Tug River Railroad Company filed its application in Finance Docket No. 5161 for a certificate that the present and future public convenience and necessity require the construction by it of a line of railroad extending from a connection with the Virginian Railway at or near Elmore in a general westerly direction to Wharncliffe, 53 miles, in Wyoming and Mingo Counties. The Norfolk & Western and the Virginian Railway joined in this application. An amended application was filed December 24, 1925, which was joined in by the Norfolk & Western only. On January 21, 1927, the Virginian & Western Railway Company filed its application for a certificate that the present and future public convenience and necessity require the construction by it of a line of railroad extending from a connection with the Guyandot River branch of the Virginian Railway at or near Itmann, down the Guyandot River to a connection with the Chesapeake & Ohio at or near Gilbert, 40.6 miles, in Wyoming and Mingo Counties. This application was joined in by the Virginian Railway Company. On October 2, 1925, the Governor of West Virginia recommended that the application of the Chesapeake & Ohio be granted. There are no other representations by any State authority. No objections to the granting of any of the applications have been made except by the other applicants. The three applications were heard together and will all be considered in this report. It is admitted by the various applicants that only one line should be built between Elmore and Gilbert.

The applicants and their respective railway systems will hereinafter sometimes be called the C. & O., the N. & W., and Virginian, applying these names indifferently to the parent companies and their subsidiaries. The Guyandot & Tug River Railroad Company, hereinafter sometimes called [fol. 48] the G. & T. R., is a subsidiary of the N. & W., and the Virginian & Western Railway Company is a subsidiary of the Virginian. These three systems serve all the coal fields of southern West Virginia and have their eastern termini on Hampton Roads. The C. & O. and the N. & W. cross the Ohio River, reaching gateways in Central Freight Association territory. Their main lines intersect at Kenova, W. Va. The Virginian does not extend west of the coal field its traverses, and has no western outlet except

over the C. & O. and the N. & W. Its northern terminus is Deepwater, W. Va., a station on the C. & O.'s main line. It runs thence southward across the eastern part of the coal fields to within a few miles of the N. & W.'s main line, connecting at Matoaka, near the southeastern limit of the coal fields, with a branch of the N. & W. Thence its route runs eastward through Princeton, W. Va., and Roanoke to Norfolk, Va.

The Guyandot River traverses the southern and western parts of the southern West Virginia coal field, flowing into the Ohio River a few miles above Huntington, W. Va. The lower Guyandot Valley is occupied by the C. & O.'s Logan subdivision, which connects with its main line at Barboursville, W. Va., a few miles east of Huntington, and extends thence up the Guyandot River to Gilbert, 90.5 miles. The main line of the Virginian crosses the Guyandot River at Mullens, two miles above Elmore, and a branch line extends down the river to Itmann, 2.45 miles. The upper Guyandot basin from the Virginian's main line east, is served by lines of the Virginian and the C. & O. Both have branches on the Winding Gulf, one of its main headwaters. This upper Guyandot basin is now producing large quantities of westbound coal, which would find their natural outlet over a line down the Guyandot River, free from adverse grades, instead of over the heavy grades of the present routes.

Between Itmann and Gilbert, 41 miles, there is no rail- [fol. 49] way along the Guyandot River, nor any in the Guyandot basin, except that the Virginian, through its subsidiary, has constructed a branch on the west side of its main line extending a few miles into the northern part of the basin. All of the proposed lines would cover this stretch from Itmann to Gilbert. The Virginian would cover this only. The C. & O.'s proposed line would also extend about 12 miles east of Itmann to a connection with its Winding Gulf branch, closely paralleling the Virginian for that distance. The N. & W., through its subidiary, would build down the river to within about one mile of the C. & O. at Gilbert, and thence 10.5 miles westerly across the divide to a connection with its main line at Wharncliffe. The Virginian and the N. & W. own rights of way covering most of their proposed routes between Gilbert and Itmann. The C. & O. does not own any right of way and its location is

made generally on the rights of way of the other applicants.

The Guyandot basin is mountainous. Between Gilbert and Mullens the river flows through a narrow crooked valley or gorge in which there is but little level land. This part of the river is only from 8 to 12 miles north of the N. & W.'s main line, from which it is separated by a high divide. North and east of the basin of the Guyandot to the Kanawha and New Rivers there is a wide area in which the main streams are occupied by branches of the C. & O., with the Virginian's territory thrust like a wedge across the eastern part of the field. The Guyandot basin between Itmann and Gilbert is estimated to contain about 330 square miles, nearly all underlaid with coal. The coal commercially minable and recoverable under present conditions is variously estimated at from not less than 500,000,000 gross tons to 1,444,000,000 short tons. The areas included in the several estimates are not precisely the same. About 60 per cent of the total coal is low volatile, which is in special [fol. 50] demand, continually requiring new sources of supply. An estimate prepared for the C. & O., covering most of the area in question, shows 118 square miles of land bearing merchantable saw timber at least 12 inches in diameter, which it is thought will produce about 355,000,000 feet b. m. of timber, nearly all hardwood. The witness expressed the opinion that timber for minor uses would add at least 20 per cent to the indicated tonnage. Other estimates of the total timber run as high as 700,000,000 feet, but the C. & O.'s estimate appears to be the most reliable. Much timber was floated down the Guyandot many years ago, generally soft wood. The remaining timber cannot be floated, and for some years timber operations have been on a very small scale.

In the tributary area there are estimated be about 30,000 acres of cultivated lands, 3,000 acres of pasture land, and a population of 6,500. The populations of towns and villages along the proposed route are given as follows: Itmann 500, Pineville 304, Bartley 51, Baileysville 261, Simon 20, Justice 32, and Gilbert 150. Except for Itmann these figures are for 1920, and it is claimed that the population has increased materially since. Wyoming County, which covers most of the area discussed, has only one hard surfaced highway, which extends from Pineville up the river to the

Raleigh County line. Nearly all the other roads are generally impassable for motor traffic about four months each year. The testimony is that a centrally located railroad, as proposed, would be of great importance to the county.

The important resources of the region, upon which all its development depends, are coal and timber. Their full exploitation will require the construction of branch lines on the principal tributary creeks, notably on Clear Fork, north of the river, and on Pinnacle Creek, south of the river, as well as on several smaller creeks, but large areas of coal and [fol. 51] timber can be reached from the proposed main line along the river and ordinary industrial spurs therefrom. This is all that the C. & O. estimates expressly provide for. The other applicants give estimates of lateral lines that would in time be constructed to give a complete service. The most extensive program is that of the Virginian, which estimates that about 140,000,000 tons of coal would be directly tributary to the line now proposed. To provide for the same local exploitation any of the applicants would require about the same branches at about the same cost, except that the N. & W. would build a line 10.5 miles long, at a cost of $2,500,000 to connect its projected branch on Pinnacle Creek with its North Fork branch, in order chiefly to haul eastbound coal from the Guyandot basin and particularly from Pinnacle Creek. The other lines would move this eastbound traffic over their presently proposed lines to a junction with their existing lines. Pinnacle Creek joins the river at Pineville, 12.6 miles below Itmann. Clear Fork, which includes a large part of the watershed north of the river, comes in at Simon, about 12 miles above Gilbert. Most of the coal lands above Pineville, including those in the basin of Pinnacle Creek, are owned by the Pocahontas Coal & Coke Company, hereinafter called the Pocahontas Company. These holdings of low volatile coal lands include about 52,500 acres west of the Virginian's main line, and cover probably 95 per cent of all land along the river from Elmore to Pineville. About 19,000 acres of its holdings on Pinnacle Creek are leased for development to a subsidiary of the United States Steel Corporation. The Pocahontas Company also owns 30,000 acres of high volatile coal lands in the Clear Fork basin from 7 to 17 miles north of the river. The Pocahontas Company is controlled by the N. & W. Such control was acquired about the end of 1901 for the

purpose of protecting the railway's coal reserves from invasion. The Pocahontas Company owns about 300,000 [fol. 52] acres of coal lands, of which 40 per cent are in the Guyandot basin. A part of these holdings are east of the Virginian's main line, and some of that part is under development. For a distance of more than 20 miles along the proposed route from Pineville west, nearly all of the lands within several miles of the river are owned by the W. M. Ritter Lumber Company, which holds about 70,000 acres, mostly in fee simple. Elsewhere there are a number of smaller owners. Most of the coal west of Pineville is high volatile, but the testimony for the Ritter Company is that its lands also contain much low volatile coal. The secretary of this company, testifying in favor of the Virginian's application, estimated that these lands would probably produce 400,000,000 tons of coal during the life of the field, and that they contain nearly 90,000,000 feet of hardwood timber. He was of opinion that they could be expected to furnish a railroad on the proposed route from 150,000 to 200,000 tons of coal in the first year of its operation, rising to 1,500,000 to 2,000,000 tons in the fifth year.

The main functions of all of the proposed lines are the same, viz., (a) to provide a suitable outlet for westbound traffic, chiefly coal, from the lines of the Virginian and C. & O. in the upper Guyandot basin; and (b) to carry the traffic to be developed by the proposed construction. The latter may be understood to include the desire of each applicant to include the coal of this basin in its reserves. The N. & W. and Virginian, in particular, have urged their needs in this respect, and the C. & O. may no doubt be assumed to have the same object. The C. & O. also claims for its project some value for moving eastbound coal from the upper part of its Logan subdivision.

Going south the Virginian's main line enters the upper Guyandot basin at Jenny Gap and follows Slab Fork to its mouth at Mullens, where it crosses the Guyandot River. It [fol. 53] It then runs down the river to Elmore, from which point it follows tributary waters to the high divide at Clark's Gap. Its length in the Guyandot basin is about 30 miles. There are a number of mines on this line, but the main coal production of the Virginian in this basin appears to be on branch lines. East of its main line the Virginian's Winding Gulf branch extends from Mullens up the river

and up the Winding Gulf, one of its main heads, to Pemberton, about 23 miles. It crosses the divide at Pemberton and extends a few miles beyond in the high upper levels of the Piney Creek basin. Its maximum grade on the Winding Gulf is 2 per cent. From Stone Coal Junction, 8 miles above Mullens, a branch of this line diverges to the east, and runs 8.6 miles up Stone Coal Creek. The C. & O. has a closely parallel line from Pemberton down Winding Gulf to Stone Coal, close to Stone Coal Junction. Most of the mines between Pemberton and Stone Coal and all of those on the Virginian's Stone Coal branch, are served jointly by the Virginian and the C. & O. From Pemberton the C. & O.'s line extends northeasterly down Piney Creek to Prince, 19.5 miles, where it connects with the main line. It joins the main Piney Creek branch at Raleigh, 6 miles below Pemberton. Between Raleigh and Stone Coal the C. & O. has only a mine switching service, operated by crews working back and forth between those points. Its line on Winding Gulf has a 1.9 per cent maximum grade and employs a switchback with tail track capacity for 22 or 23 cars. Its line down Piney Creek has a maximum grade of 2.2 per cent and much sharp curvature. From a point on its main line 5 miles north of Mullens the Virginian, through its subsidiary, has built a branch about 15 miles long, running west of its main line and crossing into the upper waters of Clear Fork.

For economy in the cost of transportation westbound [fol. 54] coal from all of the Guyandot basin, and from a small contiguous area on the upper end of the Virginian's Winding Gulf line, should move over the proposed line. The evidence on this point is undisputed and convincing. In 1926 the Virginian loaded 7,722,611 tons of coal in this area and the C. & O. loaded 2,364,740 tons, but in 1925 and 1926 an abnormal proportion of the coal was shipped east. It is represented that the proportion shipped west in the first nine months of 1927 may be taken as normal. In that period the Virginian loaded 6,141,364 tons of coal in this area, of which 2,256,638 tons were westbound; and the C. & O. loaded 1,975,575 tons, of which 1,076,710 moved west. The total westbound coal from this area was 3,333,348 tons, or at the rate of 4,444,464 tons a year, which is taken to be equal to 83,543 cars of 53.2 tons average load. Dividing

this between the present routes, as in the first nine months of 1927, 45,770 cars moved by the Virginian via Matoaka and the N. & W., 10,778 cars by the Virginian via Deepwater and the C. & O., and 26,985 cars by the C. & O. through Prince. All of this coal was from lines in the Guyandot basin, except 1,431 cars from the uplands of Piney Creek. The coal shipped west in 1927 probably included a small quantity destined to local points east of Kenova but this is held to be negligible, and Kenova may be taken as a common point in all routes to the west. Elmore, where there is a division yard, is the chief point of divergence of present and proposed routes for the Virginian's westbound coal. The distance from Elmore to Kenova is 199 miles via Matoaka, 152 miles via Deepwater, approximately 151 miles via Gilbert, and about 158 miles via Wharncliffe. Coal shipped by Matoaka must ascend the long grade from Elmore to Clark's Gap, which rises 1,125 feet, with a maximum rate of 2.07 per cent, and then move over a section of the N. & W. upon which the maximum grade is 1.10 per cent westbound and 2 per cent eastbound. The limiting [fol. 55] grades on this route are operated by electric power. Coal moved from Elmore to Deepwater passes over three divides with grades of from 1.10 to 1.65 per cent against the loads, and from 1.60 to 2.02 per cent against the empty movement. The testimony is that this part of the Virginian's route is unsuited to any heavy through movement. Stone Coal Junction may be taken as the main point of divergence for C. & O. coal. This assumption favors slightly the proposed new route. The distance from Stone Coal Junction to Kenova is 168.6 miles via Prince, and approximately 160 miles via Gilbert. The C. & O.'s main line from Prince to Kenova has generally descending grades, but crosses one divide with a long 0.3 per cent grade rising west. By the new route there would be no adverse grades above Gilbert. Traffic might well be delivered to the existing lines at Gilbert or Wharncliffe, but it would be more economical to run trains through to Peach Creek in the case of the C. & O., or to Williamson in the case of the N. & W. There are large division yards at these points. Peach Creek is 27.8 miles from Gilbert and Williamson is 30.5 miles from Wharncliffe. Between Wharncliffe and Kenova

there are no adverse grades westbound, and the eastbound grades are light. From Gilbert to Peach Creek there are no adverse grades westbound. Between Peach Creek and Kenova there is a 0.22 per cent limiting grade. Eastbound grades are very light.

Th C. & O.'s Logan subdivision, begun in 1899 and extended from time to time, now comprises 90.5 miles of main line, 71.58 miles of branch lines, and a branch 4.36 miles long under construction, all costing to date nearly $12,500,000. Of the main line 47.79 miles are double tracked. This subdivision now produces about 35 per cent of all coal originated by the C. & O., and about one-half of its tonnage is from branches that reach the main line near Peach Creek. [fol. 56] Normally about 87 per cent of the coal from this subdivision moves to destinations west of the line. In 1926 it originated more than 20,000,000 tons of coal. The testimony for the C. & O. is that in 1927 this line would haul at least 3,000,000 tons of eastbound coal, nearly all destined east of Prince. From Peach Creek to Quinnimont, a yard just east of Prince, would be 114.7 miles by the proposed line, compared with 180.1 by the present route. Considered as an independent operation, it is cheaper to haul coal by the longer route, but the C. & O. estimates that it would be advantageous to haul enough eastbound coal over the new route to fill out the return trip tonnage of engines used to haul westbound coal. The C. & O. estimates that if it moved 4,444,464 tons of coal a year west, it could move economically approximately 1,299,144 tons a year east. This possibility rests upon the assumption that for westbound overhead coal traffic one-half of the empty cars used by the Virginian and all used by the C. & O. would be supplied by the C. & O. from the east through Raleigh.

A detailed estimate of savings that would be effected by diverting coal traffic over the proposed line is submitted by the C. & O. This is estimated primarily for a line to be built and operated by the C. & O., and connected on the west with the C. & O. only, but handling the Virginian's westbound coal under some reciprocal arrangement to be made therefor. The annual estimated saving under these conditions is $600,173, of which $416,773 would be on Virginian coal westbound, $112,069 on C. & O. coal westbound,

and $71,331 on C. & O. coal eastbound. The estimated saving on westbound coal equals 14.33 cents a ton on coal now shipped by Matoaka, 11.80 cents a ton on coal now moving by Deepwater, and 7.81 cents a ton on coal shipped via Raleigh and Prince. On such eastbound coal as would be [fol. 57] shipped over the new line from the Logan subdivision the estimated saving is 5.49 cents a ton. The testimony for the C. & O. is that the fact of electric operation on the Virginian between Mullens and Matoaka and on the N. & W. between Clift Yard and Iaeger has been disregarded in the belief that the comparisons provide an accurate measure of the difference in the physical characteristics of the alternative routes as they affect transportation costs. In estimating the tonnage to be diverted to the new route the C. & O. has not assumed that the Matoaka gateway would be closed, but that the increase in westbound coal shipments would offset the volume of traffic that would continue to move that way. This estimate appears to have been made carefully and is supported by many details. It is probably high for the traffic assumed because the economies of electric operation on existing routes have been disregarded, and there is reason to question the saving shown for moving eastbound coal from the Logan subdivision, which rests upon the most favorable assumptions concerning the cost of empty car movement and the arrangements to be made with the Virginian for handling the traffic. It seems to represent the maximum possible, rather than the probable saving. There would no doubt be some advantage in moving some coal from the Logan subdivision over the proposed line, but much more economy in transportation would result from moving it east via Elmore and the Virginian, a route 70 miles shorter to Hampton Roads, and better in other respects for a large movement. The testimony for the C. & O. is that the estimated saving of $600,173 a year could not be realized fully except under a reciprocal arrangement with the Virginian by which one of the two companies would handle the bridge traffic of both over the new line in trains run from Stone Coal and Elmore through to Peach Creek; that it would be somewhat less economical to end the run at Gilbert; that in the public interest the C. & O. ought to perform this operation, be-

[fol. 58] cause all the westbound traffic should move over its line from Gilbert to its destination or to the C. & O.'s western connections; and that about 80 per cent of the coal on the new line would be westbound and should be handled from the mines to such destinations or connections by one carrier. The fact that all overhead traffic from beyond Gilbert would be C. & O. traffic is given as a further reason for preferring the C. & O. It is admitted that the methods of operation assumed in estimating the savings could be used as effectively if the Virginian handled the overhead traffic of both roads, and used the C. & O. tracks from Gilbert to Peach Creek. The C. & O. claims that the cost of moving coal via Wharncliffe and the N. & W. would be 90 cents a car, or 1.69 cents a ton, more than via Gilbert and the C. & O. exclusive of interest charges on the cost of a line from Gilbert to Wharncliffe.

The N. & W. estimates that the Virginia's westbound coal from the upper Guyandot basin could be moved for 14 cents a ton less via the proposed new line and Wharncliffe than via Matoaka, and expects that, as soon as its proposed line was completed, it would receive from the Virginian from 3,500,000 to 4,000,000 tons of coal and 30,000 tons of forest products a year, which would be diverted from the Matoaka route. No traffic is expected from the C. & O. The N. & W. claims that whatever real savings the C. & O. could effect by diverting its own overhead traffic over its proposed line, it could also gain by using trackage rights over the line which the N. & W. desires to build. The saving of 14 cents a ton, which may be compared with 12.64 cents allowed in the C. & O. testimony, is based chiefly on the saving in distance and the average cost per ton mile of hauling coal on the N. & W. in this territory, but this has been modified to take into account the advantages of the new route in grades and the saving in car time. The C. & O. claims [fol. 59] that under the present adjustment of the Virginian's rates on westbound coal shippers on the Virginian tend to favor the Matoaka route over the Deepwater route. The N. & W. would expect to operate through trains from Elmore to Williamson, doubling them over the 1.04 per cent grade leaving the Guyandot River. It claims that this grade could be so operated very economically, as Virginian

coal bound west over the C. & O. would be dropped off at Gilbert and the tonnage of trains filled out at Wharncliffe. The N. & W. would not expect to get more than one-half of the Virginian's westbound coal for movement over its line beyond Gilbert. The C. & O.'s estimate of 90 cents a car in favor of its own route does not appear excessive. Diversion of traffic to the proposed new line should result in some saving in maintenance costs on existing lines of the N. & W. and Virginian.

No estimate is submitted by the Virginian of the saving in transportation cost that would be effected by diverting traffic over its proposed line, but it submits an estimate of its earnings from all traffic that would move over the line. Coal originating off the proposed line is estimated at 2,000,000 tons the first year, increasing uniformly to 6,000,000 tons the fifth year, and to 8,00,000 tons a year thereafter. Revenue assignable to the new line from this overhead traffic is estimated at 25 cents a ton, which is based upon the Virginian's average revenue of 0.6 cent a ton mile for hauling coal. The Virginian's operating ratio for the three-year period, 1924-1926, was 60.3 per cent. It was 55.45 per cent in 1926.

The Virginian makes no estimate of the savings that would be effected by the construction of its proposed line. It appears to rely mainly on the testimony of the other applicants, except as to eastbound traffic from the territory between Gilbert and Itmann. It claims that its line pro- [fol. 60] vides the most desirable outlet to the east from this area and offers testimony to show its advantages. As above stated, its route would be 70 miles shorter to Hampton Roads than the C. & O. route via Stone Coal Junction and Raleigh. The testimony for the N. & W. is that when it built its projected line on Pinnacle Creek, and a line 10.75 miles long, costing $2,500,000, to connect its Pinnacle Creek branch with its North Fork branch, its route from the mid-point of the Pinnacle Creek branch to Lambert's Point (Hampton Roads) would be 405 miles, as compared with 399 miles to Sewalls Point (Hampton Roads) by the Virginian. The projected Pinnacle Creek branch would be 13.6 miles long. Therefore the difference in favor of the Virginian would be 19.6 miles from the mouth of Pinnacle Creek and points west, and more for all points above the

mouth of Pinnacle Creek. The projected connection apparently would have no other use. It would have maximum grades of 1.9 per cent eastbound and 2.85 per cent westbound. The N. & W. claims that its electric pusher service could readily be extended to cover this connecting line, which would bring business to its main line at a point where the coal traffic produced locally is declining. As a route from Guyandot River to the east, the route by Pinnacle Creek would be much inferior to that of the Virginian, and would require the expenditure of $2,500,000 for construction, which is not understood to include any cost for electrification. The construction of the proposed Pinnacle Creek branch and connecting line is not covered by the N. & W.'s present application.

All of the applicants submit detailed estimates of the traffic to and from points on the proposed line and the earnings therefrom. Coal is the chief commodity and from 75 to 80 per cent of the coal tonnage is expected to move west. The C. & O. expects the coal tonnage to amount to 4,750,000 tons during the first five years, and 3,000,000 tons [fol. 61] a year thereafter. The N. & W. anticipates 4,200,000 tons during the first five years and 2,000,000 tons a year thereafter. The Virginian's estimate is 3,100,000 tons during the first five years, and 1,500,000 tons a year thereafter. The coal tonnage would be developed gradually during the first five or six years. Estimates of the first year's tonnage range from 100,000 to 250,000 tons. The C. & O. expects 265,000 tons of forest products during the first five years and 75,000 tons a year thereafter. The corresponding estimate of the N. & W. is 210,000 tons and 60,000 tons, respectively. Most of these products are expected to move west of the Ohio River. Other freight tonnage is estimated by the C. & O. at 570,000 tons for the first five years and 135,000 tons a year thereafter. The N. & W.'s estimate is 320,000 tons and 120,000 tons, respectively. The revenue expected from sources other than freight is not important, the estimates ranging from $60,000 to $70,000 for the first five years. The Virginian has not estimated the traffic other than coal, but has assumed that its revenue from all sources other than coal would be 22 per cent of its revenue from coal, as on its existing lines. It has applied this percentage to the whole revenue expected

from coal, and not separately to the revenue from coal to be originated on the proposed line, to which, however, it may probably be considered applicable. Gross system revenues from traffic originating on or destined to the proposed line are estimated by the C. & O. at $11,751,000 for the first five years and $6,403,000 annually thereafter. Corresponding figures for the N. & W. are $9,332,000 and $4,177,200, respectively. From these estimated revenues the C. & O. expects a net railway operating income of $180,411 the first year, increasing to $822,505 the fifth year, and $1,301,162 a year thereafter. The N. & W.'s estimate is $205,000 the first year, $1,131,310 the fifth year, and $1,386,434 a year [fol. 62] thereafter. Operating expenses have been estimated by applying the operating ratios of the respective systems.

The Virginian has estimated the earnings of its proposed line alone, without reference to the rest of its system, and has included in one estimate all traffic to be handled and the earnings therefrom. It expects its proposed new line to originate 100,000 tons of coal the first year and 300,000 tons the second year, the tonnage then increasing uniformly to 1,500,000 tons in the sixth year and thereafter. Revenue on this coal is taken at 60 cents a ton, which is the rate division it now receives on westbound coal via Matoaka. It estimates the total coal traffic at 2,100,000 tons the first year, rising almost uniformly to 7,200,000 tons the fifth year, and 9,500,000 tons a year thereafter. The estimated gross revenue is $683,200 the first year, increasing to $2,708,400 the fifth year, and $3,538,000 a year thereafter. The operating ratio is estimated at 60 per cent, which is equal to the system ratio for the three-year period 1924-1926. The Virginian has a sufficient number of locomotives available for operating the line, which have been released by the installation of electric traction between Elmore and Roanoke, Va. The estimated net railway operating income is $225,456 the first year, rising to $893,772 the fifth year, and to $1,167,540 a year thereafter. The foregoing estimates do not cover traffic that would be developed by branches from the proposed line, which would be built later. The N. & W. asserts that the exploitation of the coal will require four branch lines, with a total length of about 52 miles, which would cost $5,275,000. The Virginian esti-

mates that full development of the territory will require about 100 miles of line, which would cost about $9,500,000.

It is admitted by the C. & O. that there is no local need for a second line between Stone Coal Junction and Itmann, and that the most desirable plan would be a reciprocal [fol. 63] arrangement by which it would operate over the Virginian between those points and would grant the Virginian trackage right over the line it proposes to construct from Gilbert to Itmann, and over any branches thereof on tributary waters of the Guyandot, the rights granted to the Virginian to be solely for eastbound traffic originating there and westbound traffic, except coal, destined there. The C. & O. would itself handle all bridge or overhead traffic in both directions and all westbound traffic originating on the proposed line, as well as what it could get of the eastbound traffic originated. The C. & O. desires to make such an arrangement on fair terms. Its counsel was unable to state whether the company would be willing to grant trackage rights of any kind to the N. & W. Upon brief the C. & O. offers to accept a certificate requiring it to grant trackage rights to the Virginian on the basis above stated, with the further provision that the Virginian shall have the exclusive eastbound haul of coal originating on the new line to points served by the Virginian, thereby assuring the most favorable eastbound route for that movement; or if the Commission preferred to keep open the C. & O.'s route to the east, it would accept a condition forbidding it to solicit coal via that route. The C. & O. contends that its plan, with these provisions, would assure a more economical movement of the whole traffic, particularly since it would provide single line movement for the C. & O.'s westbound traffic from the Winding Gulf, would require no interchange facilities at Gilbert, and would assure the economies that would result from moving over the new line a certain amount of coal from its Logan subdivision.

The N. & W. would grant trackage rights to either or both of the other applicants on the usual terms, confined to the main line now proposed and for overhead traffic only. It suggests in its brief that the Commission might properly find that there is no present necessity to construct any of [fol. 64] the proposed lines, since the bituminous coal industry is now suffering from over development. It con-

tends that a certificate issued to any applicant should be so conditioned as to protect the rights of the others; that trackage rights for overhead traffic on the usual terms, in accordance with its offer, would appropriately protect the interests of the other applicants and would give them all the advantages they would have for moving coal produced on their existing lines in the event that either of them built the line. It represents further that if the Virginian is granted a certificate the N. & W. should be allowed to build from Gilbert to Wharncliffe to permit it to haul to the west coal to be produced from leases of the Pocahontas Company's lands, and Virginian Railway coal that now moves by Matoaka; and that the C. & O. should be protected in its plan to send its Winding Gulf coal over the proposed line to Gilbert and the west.

In its application the Virginian represented that it was willing to grant trackage rights to both of the other applicants on fair terms. The Virginian's position, as stated by its president at the hearing, is that it should receive a certificate without conditions requiring it to grant trackage rights; that the service of coal mines and sawmills by more than one carrier involves a useless and wasteful multiplication of service; that although the objections are less serious to trackage rights for bridge traffic, through trains can be operated more safely, expeditiously, and economically by a single carrier; and that this single operation always tends to handling the tonnage in fewer trains. The Virginian desires to negotiate an agreement with ths C. & O. under which the Virginian would haul all traffic moving on or over the proposed line under a division of the through rate, and would obtain some eastbound traffic from the Logan subdivision in exchange for the westbound tonnage it would [fol. 65] deliver to the C. & O. It would be willing to make a similar arrangement with the N. & W. if the latter had anything to offer. The Virginian claims that the natural and economical routes for traffic from the proposed line are eastbound over the Virginian and westbound over the C. & O. Notwithstanding his objections to trackage rights the Virginian's president testified that he would advise his board to grant the C. & O. unlimited trackage rights on a user basis from Stone Coal Junction, or perhaps from Pemberton, to Gilbert, in exchange for like rights over the Lo-

gan subdivision and its branches from Gilbert to Logan. There is no indication that the C. & O. would be willing to make such an arrangement. The Virginian represents that it would be desirable to operate its trains through to Peach Creek, using trackage rights over the C. & O. from Gilbert, but that the proposed line could be operated economically as a turn around run between Elmore and Gilbert. The Virginian would not willingly grant the N. & W. trackage rights for overhead traffic unless it could secure reciprocal traffic from the N. & W. as a consideration, but it is stated, on behalf of the Virginian, that if the Commission granted it a certificate upon condition that it give the N. & W. such trackage rights, that it would accept the certificate.

The line which the C. & O. proposes to build is described in two segments, joining at Mullens, but would form a continuous line from Stone Coal to Gilbert, 52.2 miles. It is estimated to cost $9,548,000, to which must be added $556,000 for a track to connect with the Virginian at Itmann, making the total cost $10,104,000 without equipment. If the C. & O. obtained trackage rights from Stone Coal to Itmann, 12.5 miles, it would build from Itmann to Gilbert [fol. 66] at an estimated cost of $6,670,000. The N. & W. estimates that its line from Wharncliffe to Itmann, 50.2 miles, would cost $9,344,000, of which $2,600,000 is for the line from Wharncliffe to the Guyandot River just above Gilbert, 10.5 miles, and $6,744,000 from that point to Itmann. The Virginian's line 40.6 miles long, is estimated to cost $7,500,000. The evidence indicates that the cost of building the Virginian's line would be no greater than the cost of building from Gilbert to Itmann on the location of either the C. & O. or N. & W. The Virginian has estimated the cost more liberally. Its chief engineer testified that the same work would cost any of the applicants the same amount. Between Gilbert and Itmann the N. & W., through its subsidiary, owns rights of way covering nearly all of its location, and the Virginian owns rights of way except on five miles. The latter's estimate includes $125,000 for land. The C. & O. does not own any rights of way, and estimates the cost of land between these points at $600,000. Its location is made largely on the rights of way of the other applicants. All of the estimates provide for 100-pound rail.

All of the applicants propose to pay the cost of construction initially by advances from their treasuries, or the treasuries of their parent companies, which would be reimbursed later by securities issued under our authority. The N. & W. and Virginian would have securities issued by their applicant subsidiaries. In its return to our questionnaire the C. & O. stated that it would issue bonds under its first lien and improvement mortgage. At the hearing its vice-president testified that the construction cost would be reimbursed by the issue of stock and/or bonds. The C. & O. and the Virginian would commence construction as soon as authorized and would complete if in about two [fol. 67] years. The testimony for the N. & W. is that it would build the line whenever business conditions seemed to justify it.

The N. & W. and the Virginian each offered testimony to show its superior need for additional coal territory. The C. & O., by an extension system of lateral lines and branches, covers a much greater coal-bearing area than the N. & W. The main N. & W. coal fields are comprised within a narrower area, largely bounded on both sides by fields tributary to the C. & O. The Virginian's present field is much smaller than either. Estimates submitted indicate that, excluding the territory to be served between Gilbert and Itmann, the C. & O.'s coal reserves are at least 12 times as large as the Virginian's, and the N. & W.'s about 7.5 times as large, and that if the Virginian were permitted to build the proposed line and to secure the coal traffic from the territory traversed, the C. & O. would still have from 5.6 to 7.3 times as much coal as the Virginian, and the N. & W. from 3.4 to 4.1 times as much. Statistics of the past movement of coal tend to show that the Virginian's present coal reserves would probably be exhausted first. The Virginian claims that it is peculiarly dependent upon coal traffic. For the five-year period, 1922-1926, bituminous coal constituted 89.66 per cent of the Virginian's revenue tonnage, 78.09 per cent of the C. & O.'s, and 74.69 per cent of the N. & W.'s. The Virginian's revenue tonnage, other than that from bituminous coal, was about one-thirteenth as large as that of either of the other roads.

Some sort of priority is claimed by each of the applicants for its project. On behalf of the C. & O., it is testified

that on March 1, 1899, the Guyandot Valley Railway Company was incorporated to build from Huntington to Pineville. April 26, 1899, the directors of the C. & O. authorized [fol. 68] the acquisition of this company, and formally adopted the route of the Piney & Guyandot branch, the surveys for which covered a line from Prince to Pineville, following the waters of Piney Creek and the Winding Gulf. In May, 1899, the C. & O. bought the charter of the Guyandot Valley Railway Company and undertook, as required by the seller, to build 20 miles of the line on or before July 1, 1900. On October 16, 1899, the C. & O. adopted the map and profile of a line from Huntington to Pineville, and four days later filed a copy in the office of the secretary of state of West Virginia. The survey covered by these records was an actual staked location for about 27 miles from Barboursville, beyond which point it was a preliminary survey. On October 30, 1902, the stockholders of the Guyandot Valley Railway Company adopted a resolution that their line should be extended from Pineville up the Guyandot River to the mouth of Slab Fork, and adopted the route of that extension as shown by a map and profile they filed two days later with the secretary of state of West Virginia. The Guyandot Valley, financed by the C. & O., in July, 1899, commenced construction of its line up the Guyandot River from Barboursville. On October 31, 1903, the Guyandot Valley was merged with the C. & O. By June, 1906, the line had been built to Stollings, 66.9 miles from Barboursville. It reached Gilbert by two later extensions. The testimony is that this line has been extended, as market and other conditions justified, to serve a region rich in coal and timber, that it now produces about 35 per cent of the coal originated on the C. & O. system, and that its construction has been followed by a large increase in the population and property values of the territory. The only expenditures made by the C. & O. between Gilbert [fol. 69] and Mullens have been for surveys. The C. & O. completed its Piney Creek branch from Prince to Raleigh, 13.43 miles, in July, 1901. In 1905 it completed two extensions or branches of this line, with a total length of 21.48 miles, which do not form part of the route to the Guyandot Valley. The line from Raleigh to Stone Coal was completed in segments from 1908 to 1912. The C. & O. claims that it always intended to extend this line through to a

connection with a line on Guyandot River, as it now proposes to do. The testimony for the C. & O. is that its expenditures on this line and on its Logan subdivision show its intention to carry out in good faith its complete plan for a connected line. There is no testimony that any of the lines built have been or will be unprofitable in themselves without the connection now proposed. The first actual location by the C. & O., or any subsidiary or predecessor in interest, between Gilbert and Pineville, was made in 1925.

In 1901 persons interested in the United States Steel Corporation organized the Pocahontas Company, which acquired for $13,500,000 about 300,000 acres of coal-bearing land in the Pocahontas field. The entire field was then estimated to contain 365,000 acres underlaid with the Pocahontas coal seam above water level, and was producing about 5,200,000 gross tons of coal a year, of which more than 60 per cent was from the lands of the Pocahontas Company. Fearing the possibilities of independent or adverse control of so large a part of the Pocahontas field, and to prevent the entrance of competing railroads, the N. & W. bought the stock of the Pocahontas Company in December, 1901, for $20,000,000. The contract of purchase was conditioned upon a subsidiary of the United States Steel Corporation leasing about 50,000 acres of the land, erecting 1,000 coke ovens thereon in each of the three suc- [fol. 70] ceeding years, and shipping only over the N. & W. and its designated connections. The Pocahontas Company is not an operating company. Its revenues are derived wholly from leases and the sale of standing timber. A vice-president of the N. & W. testified that at the time his company acquired control of the Pocahontas Company, and as a part of its general policy of securing the existing and future tonnages of coal for transportation, it promoted the project of a railroad down the Guyandot River from Elmore to Gilbert and Wharncliffe; that the G. & T. R. was chartered for that purpose, and that construction was commenced. The G. & T. R. was incorporated on June 18, 1903, to build from Clark's Gap to Wharncliffe. On September 8, 1903, before it had located a line on the ground, it filed with the secretary of state of West Virginia maps of its location from Clark's Gap to Wharncliffe and from Pineville to the mouth of Barker Creek, covering the gen-

eral route now proposed. At various times from March 31, to August 25, 1905, it so filed, in four parts, the map of its revised location, which had been staked on the ground. The G. & T. R. was not incorporated until some time after surveys on the Guyandot River had been begun by the Deepwater Railway Company, a predecessor of the Virginian, whose entrance into the coal fields was being vigorously opposed by the N. & W. The G. & T. R. owns rights of way covering its line between Gilbert and Elmore, except for a distance of 1.2 miles. These cost about $125,000, and were nearly all acquired in 1906-7. In 1915, the G. & T. R. acquired about 1 mile of right of way from Wharncliffe east, but it does not appear to own any other right of way between Wharncliffe and Gilbert. The N. & W. has advanced $263,000 to its subsidiary since the latter was incorporated, which has been spent for engineering, rights [fol. 71] of way, and perhaps for some construction. There is no evidence showing when or where any construction was done.

The Deepwater Railway Company, hereinafter called the Deepwater, was organized on January 19, 1898, to build from a point on the north side of the Kanawha River, opposite Deepwater, to Glen Jean, W. Va. In 1898 it built from Deepwater to Robson, about 4 miles. Surveys for the extension of this line through the coal fields to the N. & W. were begun in March, 1902. At that time the C. & O.'s system of lateral branches south of New River was much less extended than at present. By September, 1902, the Deepwater had carried its surveys across the Guyandot basin to Clark's Gap on the general route of the Virginian as since built. This route was chosen in preference to one further east because it gave access to the coal fields of the Guyandot basin. The Deepwater also realized that a line down the Guyandot River would give it the best possible grade line as an outlet to the Ohio River and the west, and decided to make surveys in the Guyandot Valley for about 50 miles, covering the most difficult part of the route, so as to avert the danger of being cut off by the C. & O. or N. & W., which had taken a hostile attitude and were making surveys and filing locations interfering with the lines it had already surveyed. In 1902-3 surveys were made from Elmore to Gilbert, and on September 4, 1903, the directors of the Deepwater formally adopted the map

and profile of a location between those points. Rights of way covering most of the line were acquired, chiefly in 1903 and 1905. Much of the right of way was condemned from the Pocahontas Company. On April 22, 1907, the Deepwater deeded its property to the Virginian. The Virginian, realizing that its route between the Guyandot River [fol. 72] and Deepwater is unfit for use as part of a trunk line railway, claims to have held steadily to its purpose of securing a western outlet by building down Guyandot River, but has been obliged for various reasons to defer from time to time the carrying out of the project. On December 3, 1915, the Virginian adopted a map and profile of location from Elmore to Gilbert. In 1917 it built 1.26 miles of line from Elmore toward Itmann, and in 1918 bought 112 acres of land near Gilbert for a yard. In 1924 the Virginian & Western, a subsidiary of the Virginian, organized for the purpose of building branches or extensions in the coal fields west of the Virginian's main line, constructed 1.19 miles of line, completing the 2.45 miles from Elmore to Itmann. The Virginian & Western has formally adopted a revised survey from Elmore to Gilbert, which follows, with some exceptions, the right of way acquired by the Deepwater. The Virginian now owns right of way covering all of the route except five miles, and will transfer this to the Virginian & Western if the certificate is issued.

The Virginian offered testimony to the effect that its line was built primarily to haul coal to Hampton Roads; that it had no through rates for westbound coal until it was obliged to publish them under protest in 1925 in compliance with our orders; that in the first six months of 1927, 34.9 per cent of its commercial coal was destined to western points; that it receives very little profit from hauling the increasing proportion of westbound coal over the present disadvantageous routes, and delivers it without securing any tonnage in exchange; and that it therefore needs a more economical route for its westbound coal and an opportunity to increase its long haul traffic by opening new areas of coal for movement to the east. It is further [fol. 73] testified that the output of mines on the Virginian is rapidly reaching its peak, and that, as the Virginian is dependent on its coal traffic, it has a peculiar need for new coal reserves; that it is usual for connecting carriers to interchange freight on a reciprocal basis, even

when they have no definite understanding about it; and that if the Virginian's line were extended to Gilbert it should be able to secure some eastbound tonnage from the Logan subdivision in exchange for the short haul westbound tonnage it would deliver. The traffic manager of the Virginian testified that the average haul of coal from the Logan subdivision to Hampton Roads would be 142 miles less by the Virginian than via Barboursville, and that the saving in distance would be much greater to points south of Virginia. He testified further that if the point of interchange with the C. & O. were at Elmore there would be a congestion of traffic that could be avoided by interchanging at Gilbert.

Witnesses from Wyoming County, which includes most of the area to be served by the proposed line, testified that a railroad along the Guyandot River is necessary to the development of the county, especially in view of the high cost of hauling for long distances over unimproved mountain roads; and that, in order to give the northern part of the county reasonable access to a railway, it is necessary to build also the Virginian's projected line on Clear Fork. Their position is that the Virginian would provide the only suitable outlet to the east; that it would connect the county directly with Princeton and Roanoke, the cities with which they desire to do business, and that its service should be extended to the Ohio River, thus giving them a through line to the west also.

All the evidence shows the need for a line to connect [fol. 74] the railways on the upper and lower waters of Guyandot River. The C. & O.'s claim to build this line is based in part on the fact that it owns the railway on the lower Guyandot and a branch line on its extreme upper waters, and that these lines would be united to form a continuous line, 177 miles long, joined at both ends with its main line in accordance with a plan of ultimate development adopted in 1899 and adhered to since. The existing lines on this route have been built from time to time, primarily for the traffic they would originate, and there is no testimony to show that they have been or would be unprofitable in themselves without the proposed connection. The principal need for that connection, apart from its local service, is to provide an economical outlet for westbound coal mined in the Upper Guyandot basin. More than two-

thirds of this coal is originated by the Virginian, and the Virginian is subject to greater disadvantages in hauling its part. Moreover the Virginian's part is 27 per cent of its total coal tonnage, while the C. & O.'s part is 2.6 per cent of its coal tonnage. According to the study made by the C. & O., 79 per cent of all the savings that could be effected by diverting westbound coal to the new route would be derived from the Virginian's coal. It is admitted that eastbound traffic from the C. & O.'s line on the lower Guyandot can be hauled more economically over its present route than over the proposed connecting line, except to the extent that eastbound coal may be used to fill the return trip tonnage of engines that haul westbound coal. The estimated saving from this eastbound movement is important, though relatively small, but rests upon assumptions that appear too favorable. Even if we accept it, 69.4 per cent of all savings to be effected by diverting traffic to the new line, as estimated by the C. & O., are from the Virginian's traffic. [fol. 75] No sufficient reason is shown why the Virginian should depend upon arrangements with another carrier for the use of a line in which it has a greater natural interest, and for which it has a much greater need. All of the overhead traffic can be handled as cheaply by one carrier as another, taking it between the same points. The Virginian is peculiarly dependent upon coal traffic, needs additional coal reserves, and cannot find them elsewhere. It has the most economical route for handling eastbound business from the territory of the proposed line, as well as from the upper part of the C. & O.'s line on the lower Guyandot. If it could secure some tonnage from the latter, in exchange for westbound tonnage delivered by it to the C. & O., that would be in the interest of transportation economy. The C. & O. would obtain a right of way from Gilbert to Itmann by taking, in large part, the rights of way owned by the other applicants.

The special claims of the N. & W. rest chiefly upon the facts that its coal reserves, although at least seven times as large as those of the Virginian, are only about 60 per cent as large as those of the C. & O.; that it acquired control of the Pocahontas Company at the end of 1901 to protect its coal reserves and followed this in June, 1903, by incorporating a subsidiary which has made surveys and has acquired a

right of way for a railroad over the disputed ground; and that the Pocahontas Company owns about 82,500 acres of coal lands that would be tributary to a line between Itmann and Gilbert, including 95 per cent of all land along the main river above Pineville. The N. & W. would contribute none of the overhead traffic of the proposed line. It does not propose to build the line at any definite time. Its immediate object is to hold for its own road the coal and other [fol. 76] resources of the Guyandot basin between the Virginian and the C. & O., which is a territory very close to its own main line, but separated therefrom by a high divide. When it built the line the N. & W. would expect to get not more than one-half of the Virginian's westbound coal, provided the Virginian were granted trackage rights. Its route would not be as economical for westbound traffic as a route via Gilbert and the C. & O., and requires building a line from Gilbert to Wharncliffe at a cost of $2,500,000. This line would have no immediate use except to connect the N. & W.'s main line with the Guyandot Valley. Ultimately it would develop some coal traffic. To handle eastbound traffic from its proposed line the N. & W. would have to build a connection from a projected branch up Pinnacle Creek to its North Fork branch at an estimated cost of $2,500,000. The eastbound route so created would be inferior to that of the Virginian, except probably from a small part of the territory to be served. If the N. & W. built the line there would seem to be little probability of any arrangement by which east bound coal from the upper end of the Logan subdivision might be routed via Elmore and the Virginian.

The Virginian needs its proposed line in order to have greater independence in the matter of an outlet for westbound coal. It appears that it can have no suitable outlet to the west except down Guyandot River, and it is not desirable to put the ownership of the line through this narrow mountain valley or gorge under the control of one of its competitors. Trackage rights for overhead business would diminish, but not remove this objection. The grant of a certificate to the Virginian will insure supplying the necessary connection between the lines on the upper and lower [fol. 77] Guyandot at the minimum cost of construction, and operation by the Virginian of the proposed line should

tend to some economies in the cost of handling eastbound freight as compared with operation by the other applicants. Multiple operation of the line by the three applicants would not tend to economy or efficiency. The people of the local territory prefer the Virginian for reasons that appear to be sound. So far as the question of priority intervenes, the Virginian's claim appears at least as good as any others.

The construction of that part of the N. & W.'s proposed line from Wharncliffe to Gilbert would enable the N. & W. to compete with the C. & O. for westbound traffic from the Guyandot Valley, and would assure operators in the territory competitive service to the west. The N. & W. might be disposed to permit the exploitation of the lands of the Pocahontas Company, provided it received the westbound tonage therefrom at Wharncliffe.

Upon the facts presented we find (a) that the present and future public convenience and necessity require the construction by the Virginian & Western Railway Company of the line of railroad in Wyoming and Mingo Counties, W. Va., described in its application in Finance Docket No. 6067 and in the report aforesaid, upon the condition that the construction of said line shall be commenced on or before January 1, 1929, and be completed on or before December 31, 1931; (b) that the present and future public convenience and necessity require the construction by the Guyandot & Tug River Railroad Company of that portion of its proposed line in Mingo and Wyoming Counties, W. Va., extending from Wharncliffe to Gilbert, described in its application in Finance Docket No. 5161, and in the report aforesaid, upon the condition that construction of said part [fol. 78] of its proposed line shall be commenced on or before January 1, 1929, and be completed on or before December 31, 1931, and that as to all other matters said application will be denied; and (3) that the present and future public convenience and necessity is not shown to require the construction by the Chesapeake & Ohio Railway Company of the lines of railroad described in its application in Finance Docket No. 4818 and such application will be denied. Appropriate certificates and orders will be issued. Such certificates will provide that they shall take

effect and be in force from and after 30 days from their date.

PORTER, Commissioner, dissenting in part:

I concur in that part of the foregoing expression of the majority which finds it for the present and future public convenience to authorize the construction by the Virginian & Western Railway Company of the line of railroad from Itmann to Gilbert. I believe, however, that in the public interest there should be a condition attached requiring it upon fair terms, to accord to the Chesapeake & Ohio trackage rights for overhead traffic over the line from Gilbert to Stone Coal, thereby affording that company an additional route from its main line at Barboursville to its main line, 177 miles, at Prince. I am unable to force my mind to the conclusion, required by law before authorizing new construction, that the present or future public convenience and necessity requires the construction by the Guyandot and Tug River Railroad Company of the line from Wharncliffe to Gilbert.

This Commission heretofore has had occasion to express itself as to the general principles which should be borne in mind in the solution of a problem, such as the one before [fol. 79] us, in Construction of Railroad Lines in Eastern Oregon, 111 I. C. C. 3, 45, where we said:

> The general principles which are to guide us are not difficult to establish. Congress has undertaken to develop and maintain for the people of the United States, an adequate railroad system. It has recognized that as to individual carriers the preservation of their earning capacity and conservation of their financial resources is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources, and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public, as well as in benefit; and that, when a railroad inflicts injury upon its rival it may be the public which ultimately bears the loss.

There is no question involved here as to the earning capacity and the financial resources of the three carriers

directly concerned. They are each of them among the more prosperous class of railroad companies and they are in no need of special benefits or privileges from us. The only question for determination is whether the present or future public convenience and necessity require, or will require, the construction of the 10.5 mile here referred to, or whether its building is unnecessary and would involve a waste of resources, which ultimately the public must bear.

It is well to have before us the physical characteristics of the country now being served by these various carriers, quite fully described in the opinion of the majority, and also one or two others not described by them. In addition [fol. 80] to the situation as expressed by them, there is commencing near Huntington, on the Ohio River, a mountain ridge which extends in a southeasterly direction until it reaches the vicinity of the Bluestone River. This ridge has a varying height above the surrounding valley of from 600 feet to as high as 1,600 feet, which it reaches almost immediately between Wharncliffe and Gilbert. It is so outstanding that it marks the boundary in whole or in part of six counties in this region. As explained by the majority, north of this ridge and south of the Kanawha and New Rivers are located extensive coal fields, among them being the Logan Field and the New River Field. These are now adequately and efficiently served by the Chesapeake & Ohio and the Virginian Railroad Companies. This is admitted by all and disputed by none. To the south of this mountain ridge and along the Big Sandy and the Tug Fork of that river is the main line of the Norfolk & Western, occupying a territory which is exclusively, and adequately and efficiently, served by that line. The Virginian breaks through this mountain ridge at Clark's Gap and intersects the Norfolk & Western on the other side of the ridge at Matoaka. It will thus be observed that this mountain ridge constitutes a natural barrier or dividing line between the territory now served by the Chesapeake & Ohio and the Virginian and that served by the Norfolk & Western.

The majority here find public necessity requires that the Norfolk & Western build 10.5 miles across this mountain ridge from Wharncliffe to Gilbert, thus invading a territory new to it, except for the traffic that it now receives through the Matoaka gateway, and which nature seems to have

raised as a barrier against its entrance. This construction is to be at a cost of $2,600,000 and will have an adverse [fol. 81] grade as much as 1.04 per cent, which will require doubling by the trains in rising from the Guyandot River Valley and crossing this ridge. There is no hint in this record anywhere but that this territory is being economically and efficiently served by the Chesapeake & Ohio and the Virginian, and that these carriers have a present capacity far beyond that now required of them. Nor will the construction here authorized from Itmann to Gilbert alter the situation. There is a splendid outlet from Gilbert to Barboursville and then to the west over the main line of the Chesapeake for the coal produced in this region. From Gilbert to Barboursville, a distance of 90.5 miles, there are uniform and consistently favorable grades and for more than half of this distance the line is double-tracked. From this same territory there are already three additional outlets to the west, one over the Virginian and the Chesapeake & Ohio at Deep Water; one by the Virginian and the Chesapeake & Ohio at Pemberton; and one by the Virginian and the Norfolk & Western at Matoaka. It is conceded in the record that none of these is equal to the route through Barboursville, though in the first nine months of 1927, 45,770 cars moved via Matoaka and the Norfolk & Western. The majority refer to the indisputable fact that it will cost 90 cents a car more to move coal over the new construction by way of Wharncliffe than over the Chesapeake & Ohio by way of Gilbert and Barboursville and this without making any allowance whatever for interest on investment or other fixed expense. In fact, the majority, as it will be observed in their opinion, concede in referring to this new proposed route:

> Its route would not be as economical for westbound traf- [fol. 82] fic as a route via Gilbert and the Chesapeake & Ohio and requires building a line from Gilbert to Wharncliffe at a cost of $2,500,000. This line would have no immediate use except to connect the N. & W. main line with the Guyandot Valley. Ultimately, it would develop some coal traffic.

Search may be made of this record in vain to find a scintilla of evidence justifying a finding that the present or fu-

ture public convenience and necessity require, or will require, the construction of this 10.5 miles of railroad. I am abundantly confirmed in this statement by the fact that a search of the opinion of the majority will reveal but a single paragraph even hinting at a reason for this construction. I propose to quote from that paragraph:

> The construction of that part of the N. & W.'s proposed line from Wharncliffe to Gilbert would enable the N. & W. to compete with the Chesapeake & Ohio for westbound traffic from the Guyandot Valley and would assure operators in the territory competitive service to the west.

This is new and strange doctrine for this Commission to announce as a sole reason for new construction. As far back as in Public-Convenience Application of Utah Terminal Ry., 72 I. C. C. 89-93, wherein it was stated, that the applicant's main contention that a competing line is necessary in order to furnish interstate service in the movement of coal, we said:

> So long as the available supply of coal can promptly reach the consuming public over existing lines, it is difficult [fol. 83] to perceive how public convenience and necessity can be served by the establishment of competing facilities. 'Public convenience and necessity' has been defined as a 'strong or urgent public need.' Wis. Telephone Co. v. Railroad Comm., 162 Wis., 383; 156 N. W. 614. A public need can hardly be predicated upon the demand of three shippers who may desire to introduce the element of competition in order to improve their position in their own competitive field. While one of the purposes of the transportation act, 1920, was to preserve competition between carriers, the provisions of paragraphs (18) to (20), inclusive, of section 1 negative any presumption that it was the purpose of Congress to permit the construction of new and competitive lines of railroad where existing facilities are adequate or can be made so by the exercise of available administrative remedies.

It will be observed in that case there were three shippers at least who were demanding this competitive service, while this record is barren of anybody's request other than the

applicant itself. But as to this the Supreme Court has said, "for now the interests of the individual carrier must yield in many respects to the public need." U. S., et al., v. Ill. Central R. R. Co., 263 U. S. 515, 525. It would be startling indeed to find that because a carrier wishes to construct a line we should grant the certificate. This sole reliance of the majority was effectively answered by Commissioner Woodlock in Construction of Lines in Eastern Oregon, supra, where he said:

Congress has enjoined upon the Commission the duty of [fol. 84] 'preserving competition' so far as possible in the grouping of railroads through consolidation. If, however, it had desired to introduce yet more 'competition' into the industry, through control in the hands of this Commission over new construction and extensions, it would doubtless have instructed us to that effect, instead of referring us to 'public convenience and necessity' as the test to be applied to new projects. 'Competition' means alternative service available to a shipper or a district; it implies existence at all times of more facilities than are actually needed to move the traffic. The law clearly contemplates that railroad plant in existence shall, as a whole, receive a 'fair return' from the rates. It is impossible, therefore, to avoid the conclusion that when Congress gave us power to govern new construction it did so with the intent that we should prohibit the building of unnecessary new facilities. New facilities become necessary when existing facilities become inadequate. 'Monopoly' is not necessarily synonymous with inadequacy. 'Competitive' facilities are not 'necessary' merely because they are 'competitive.' Doubtless, every shipper is ready at all times to welcome another railroad into his territory; doubtless every railroad is ready at all times to enter another railroad's territory and share the business that the other has developed; doubtless no railroad desires a new 'competitor'; these are all very natural states of mind. But somebody must pay for the new facilities and they must be supported by the rates.

To sum up then, we have a situation where the construction by the Virginian of this link between Itmann and Gil- [fol. 85] bert will form a splendid arrangement for traffic

originating thereon as well as for some Chesapeake & Ohio coal moving eastbound to tidewater from the lower Guyandot Valley and Virginian coal moving westbound from the upper Guyandot Valley. The service will be complete and for aught we know will be fully adequate to meet the needs of shippers along the line. Assuming for the moment that the line as so constructed is in operation. Under the power conferred upon us by paragraph (18) of section 1, as so ably interpreted in Texas & Pac. Ry. v. Gulf, Etc., Ry., 270 U. S., 266, as follows:

but where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another may be inimical to the public interest.

we should and undoubtedly would consider very carefully the proposed entry of another line at a cost of two and one-half millions of dollars to be added to the financial structure upon which a fair return should be earned. In this case the majority conceive, even before the Virginian's line is built, that another carrier will be "required" in the public interest to serve this territory. In this conception they rely, not upon the claim of any prospective shipper, tive service might prove desirable and with a hint that con-
[fol. 86]. struction of the line by the Norfolk & Western or shippers, but apparently upon the theory that competi- inadequate. "Monopoly" is not necessarily synonymous might induce it "to permit the exploitation of the lands of the Pocahontas Company, provided it received the west- bound tonnage therefrom at Wharncliffe."

On the question of competition I agree wholeheartedly with the remarks of Commissioner Woodlock in the Ore- gon Case which I have quoted. If "exploitation" of the Pocahontas Company coal lands is to be dependent upon haulage of the coal by the Norfolk & Western, it may be that its exclusion from this territory will have the whole- some effect of avoiding the over-production suggested by

this carrier on brief as a possible reason for denying all of the applications.

I am unable to distinguish the facts and the law here under consideration from that dealt with by the Supreme Court of the United States in Texas & Pac. Ry. v. Gulf, Etc. Ry., supra. It will be recalled that in that case the Santa Fe wished to build a line into an industrial district, 2½ miles west of the city of Dallas, Texas, theretofore not reached by any of its lines but which was being served by the Texas & Pacific. In that case, the Santa Fe was seeking to build into new territory, adequately and efficiently served by another carrier. Here the Norfolk & Western is seeking to build into new territory, adequately and efficiently served by other carriers. There, they sought to build a line 7½ miles in length, involving but two small trestles and numerous ordinary fills and cuts. Here they seek to build 10½ miles over a high mountain ridge. There they sought to build at a cost of $[illegible]. Here they seek to build at a cost of $2,000,000. Here the majority hold that, for competative reasons, the line may be built. As for me, I prefer to follow the reasoning of the Supreme Court and our own holdings, and deny this construction.

[fol. 87] At a Session of the Interstate Commerce Commission, Division 4, Held at Its Office, in Washington, D. C., on the 23rd Day of July, A. D. 1928

Finance Docket No. 6067

Construction of Line by Virginian & Western Ry.

Finance Docket No. 5161

Construction of Line by Guyandot & Tug River R. R. Co.

Finance Docket No. 4818

Proposed Construction of Lines by Chesapeake & Ohio Ry. Co.

Certificate and Order

A hearing and investigation of the matters and things involved in these proceedings having been had, and said

division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof.

It is hereby certified, That the present and future public convenience and necessity require the construction by the Virginian & Western Railway Company of the line of railroad in Wyoming and Mingo Counties, W. Va., described in its application in Finance Docket No. 6067 and in the report aforesaid: Provided, however, and this certificate is issued upon the express condition, that the construc-[fol. 88] tion of said line of railroad shall be commenced on or before January 1, 1929, and be completed on or before December 31, 1931.

It is further certified, That the present and future public convenience and necessity require the construction by the Guyandot & Tug River Railroad Company of that part of its proposed line of railroad extending from Gilbert to Wharncliffe, in Wyoming and Mingo Counties, W. Va., described in its application in Finance Docket No. 5161 and in the report aforesaid: Provided, however, and this certificate is issued upon the express condition, that the construction of that part of the proposed line between Gilbert and Wharncliffe shall be commenced on or before January 1, 1929, and be completed on or before December 31, 1931.

It is ordered, That as to all other matters the application of the Guyandot & Tug River Railroad Company in Finance Docket No. 5161 be, and it is hereby, denied.

It is further ordered, That the Virginian & Western Railway Company and the Guyandot & Tug River Railroad Company shall report to this Commission, in writing, the commencement and the completion of construction of the lines of railroad herein authorized within 15 days after such commencement and completion, respectively.

It is further ordered, That the Virginian & Western Railway Company and the Guyandot & Tug River Railroad Company, when filing schedules establishing rates and fares applicable on the respective lines herein authorized to be constructed, shall in such schedules refer to this certificate and order by title, date, and docket number.

It is further ordered, That this certificate and order [fol. 89] shall take effect and be in force from and after 30 days from its date.

It is further ordered, That the Virginian & Western Railway Company and the Guyandot & Tug River Railroad Company shall report to this Commission as required by Valuation Order No. 24, effective May 15, 1928.

And it is further ordered, That the application of the Chesapeake & Ohio Railway Company in Finance Docket No. 4818 be, and it is hereby, denied.

By the Commission, division 4.

George B. McGinty, Secretary. (Seal.)

[fol. 90] In United States District Court

[Title omitted]

Intervention of Interstate Commerce Commission—Filed December 27, 1928

To the Honorable Judges of said Court:

In accordance with the provisions of the Judicial Code, 36 Stat. L. 1150, we hereby enter the appearance of the Interstate Commerce Commission as a party defendant, and of ourself as its counsel, in the above entitled suit.

Daniel W. Knowlton, Nelson Thomas.

[fol. 91] In United States District Court

[Title omitted]

Answer of The Guyandot and Tug River Railroad Company and Norfolk and Western Railway Company, Defendants—Filed January 2, 1929

The Guyandot and Tug River Railroad Company and the Norfolk and Western Railway Company for answer to the Petition filed herein against them say:

1. These Defendants admit the allegations of Section I of the Petition.

2. These Defendants admit the allegations of Section II of the Petition.

3. These Defendants admit the allegations of Section III of the Petition except that the Order is incorrectly stated to authorize the Guyandot to construct and operate a line of railroad from Wharncliffe to Gilbert, the fact being that that authority was to construct and operate a line of railroad "from Gilbert to Wharncliffe." That Order and subsequent Orders are for greater certainty referred to by these Defendants.

4. These Defendants admit the allegations of Section IV of the Petition.

5. These Defendants admit the allegations of Section V of the Petition in quoting the statutes; and deny the application of the argumentative averments and the declaration of policy of the statutes.

6. These Defendants admit the allegations of Section VI of the Petition.

7. These Defendants admit the allegations of Section VII of the Petition.

8. These Defendants admit the allegations of Section VIII of the Petition.

[fol. 92] 9. These Defendants admit the allegations of the first sentence of Section IX; and deny the correctness of each and every other allegation contained in the first paragraph of that section, and specifically deny the correctness of the argumentative averments and conclusions from the Commission's report and their application to this proceeding. The Defendants aver that the new line of the Virginian when constructed from Itmann to Gilbert is authorized by the Certificate of the Commission of July 23, 1928, to be constructed as described in the Application of the Virginian in F. D. 6067.

These Defendants answering the second paragraph of IX of the Petition deny that the railroad authorized to be constructed and operated by them from Gilbert to Wharncliffe will have "a heavy grade adverse to westbound traffic, over a high range of mountains" and deny that that

"proposed line in connection with the Virginian and Western's new line is seven miles longer than the route afforded by the Logan Subdivision" of the Plaintiff. The second paragraph of IX of the petition states no points of destination for the comparison and the averment that the line of the Norfolk Company is seven miles longer is in consequence without meaning in the context.

These Defendants admit the allegations of the third paragraph of Section IX in so far as they relate to the origin and volume of the coal traffic and the assembly point on the Virginian, and that the movement of that traffic will be principally to the West. They deny "that the only use that can presently be made of the Guyandot's proposed line is to handle west bound traffic from the Virginian & Western's new line;" and deny that each and every carload of coal would move to the West via the Wharncliffe line "at a cost of at least ninety cents per car over and above the cost of the movement of such car by the Logan Subdivision, exclusive of the interest and maintenance charges." On the contrary these Defendants aver that the maximum grade of the proposed line will be 1.0%; that the existence of this grade would add less than one cent per ton to the cost of handling coal; that trains of 6400 tons can be handled with one locomotive and helper service over this grade to the West or by doubling over that [fol. 93] grade with 40 loads in each cut of cars; that the disadvantage of one cent a ton would be negligible in itself and would be more than overcome by other proven advantages in operating costs such as the advantage to the Norfolk Company in the costs of freight car and locomotive repairs, depreciation and retirements, as contrasted with the Chesapeake Company in regard to those costs. Defendants further deny that the Logan Subdivision of the Chesapeake Company will afford "the best, shortest, cheapest, and most economical route for the movement to or from the west of all traffic originating on or destined to the Virginian and Western's new line, and for the movement to the west of traffic originating on the lines of the Virginian to the east of the Virginian and Western's new line, and that the Guyandot's proposed line is an unfavorable, uneconomical, and wasteful route for such movement."

10. These defendants deny the allegations in paragraph 1 of Section X of the Petition that the record made before the Commission contained no evidence of the present or future public convenience or necessity for the line from Gilbert to Wharncliffe; that the saving claimed was based upon the construction by the Norfolk Company of the line from Elmore to Gilbert and thence to Wharncliffe; and that the saving cannot be effected by the construction of the Norfolk Company's proposed line.

These Defendants also deny that the proposed Gilbert-Wharncliffe line can be used only for westbound traffic. These Defendants aver that the line will be used, as the evidence showed and the Commission's order stated, in the future for the carriage of coal tonnage which will originate on Horsepen Creek tributary to the proposed line from Gilbert to Wharncliffe, and will move both East and West, and will be used also for miscellaneous traffic moving eastbound to destinations on the existing lines of the Virginian or on the new line to be built by the Virginian and Western.

These Defendants answering numbered paragraph 2 of Section X deny the allegations in that paragraph that the certificate and orders were made without authority either in law or in fact and were in consequence contrary to law and arbitrary; that the certificate and orders were made under an erroneous conception and theory of the law; and that "no finding of fact is made in support of the said [fol. 94] certificate and orders, and the only reasons or purported reasons assigned in support thereof are that the construction of the proposed line would enable the Norfolk to compete with the plaintiff for westbound traffic from the Guyandot Valley, and would assure operators in that territory competitive service to the west."

These Defendants also deny "that the Logal Subdivision of the plaintiff is capable of hauling far more economically the westbound traffic which the new line could deliver at" Gilbert, and the argumentative averment of the remainder of numbered paragraph 2 based upon this statement. On the contrary these Defendants further say that:

The greater part of the traffic which is expected to move over the line from Itmann to Gilbert which the Virginian has been authorized to construct, will be coal originating

on existing lines of the Virginian Railway and destined to the West, and which is now moving via other routes at the rate of about 3,500,000 tones per annum and is expected to increase.

That coal originates at mines on existing lines of the Virginian which are either local to its rails or served jointly by the Virginian and Chesapeake and Ohio. From the local mines (and from joint mines which are directly intermediate) there are joint rates via the rails of the Virginian in connection with both the Chesapeake and Ohio and the Norfolk and Western, through Deepwater to Matoaka, respectively. From 27 other joint mines there are likewise joint rates in connection with the Norfolk and Western via Matoaka, but the Chesapeake and Ohio has refused to join with the Virginian in establishing joint rates via Deepwater, because it has its own rails all the way from those mines to the West.

The coal shippers, in their own interest, have caused eighty per cent. of all westbound coal originating on the Virginian to be moved via Matoaka and the Norfolk and Western, and the Commission, in giving its approval to the Gilbert-Wharncliffe construction, has declined to deprive them of the continued opportunity to use Norfolk and Western routes. This declination of the Commission was [fol. 95] inevitable from the circumstance that the Matoaka route via Virginian and Norfolk and Western for Virginian coal to the West was opened in 1925 by the publication of through routes and joint rates in response to an order of the Commission (Wyoming Coal Co. v. Virginian Ry. Co., 96 I. C. C. 359), and was at that time the most available route and superior to any possible route of Virginian and Chesapeake and Ohio.

If the Gilbert-Wharncliffe line is not built, then the existing routes via Matoaka must be continued. To the extent that the shippers continue to use the Matoaka route, the use of the Itmann-Gilbert line of the Virginian will be curtailed and the participating carriers will be unable to accomplish the operating economies which would result from the use of that route.

Quite apart from the considerations mentioned in the decision as justifying the Gilbert-Wharncliffe line, the operating economies which will result on existing traffic and

cannot be accomplished without this line justify its construction.

These Defendants further ~~answering~~ numbered paragraph 2 aver that the opinion of Commissioner Porter dissenting in part rests upon a mistake of fact. Commissioner Porter's dissenting opinion would have denied the certificate for the proposed line from Gilbert to Wharncliffe as extending the Norfolk and Western "into new territory, adequately and efficiently served by other carriers." The dissenting opinion also states that "there is no hint in this record anywhere but that this territory is being economically and efficiently served by the Chesapeake and Ohio and the Virginian, and that these carriers have a present capacity far beyond that now required of them." These Defendants aver that there is no railroad and no railroad service in that part of the Guyandot Valley which was the subject of these applications; and further aver that the only raiding into business of another carrier which is being attempted by the present injunction petition is that the Petitioner, the Chesapeake Company, objects to the certificate granted to the Norfolk Company for the reason that the Chesapeake Company seeks to transfer to [fol. 96] its line business now being carried by the Virginian and Norfolk Companies via Matoaka to the West.

These Defendants further aver that there is no business of any kind which will be taken from the Chesapeake Company by the construction and operation of the line of the Norfolk Company from Gilbert to Wharncliffe.

11. These Defendants admit the allegations of Section XI of the Petition.

12. These Defendants deny the correctness of each and every allegation and conclusion of law, and of all argumentative matter, in Section XII of the Petition.

13. These Defendants aver that the only interest of the Chesapeake Company in objecting to the certificate to the Norfolk Company for the construction of the proposed connecting line to the West from Gilbert to Wharncliffe is the desire to seize and divert to the lines of the Chesapeake Company coal tonnage now moving at the rate of about 3,500,000 tons of coal annually to the West via Vir-

ginian and Norfolk and Western; and to be the sole Western connection of the Virginian's new line when built beyond Gilbert; and that these interests are private interests of the Chesapeake Company not bearing upon the public interest which the Commission was required to find and did find as supporting the certificate issued under the Commission's administrative authority.

Wherefore, having fully answered, these Defendants pray that the Petition shall be dismissed at the cost of the Petitioner and for such further orders as may be appropriate.

John H. Holt, Robert E. McCabe, D. Lynch Younger, Theodore W. Reath, Attorneys for Guyandot and Tug River Railroad Company and Norfolk and Western Railway Company.

January 2, 1929.

[fol. 97] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE UNITED STATES—Filed January 3, 1929

United States, for answer to the petition filed herein against it, says:

I

United States admits the allegations and conclusions contained in paragraphs I, II, III and IV of the petition, with this exception: it does not admit that the map filed as Exhibit I with the petition correctly shows the portion of West Virginia in which are situated the lines of railroad of the several applicants before the Commission, or their parent companies or the principal streams and mountains of said territory.

II

United States admits the allegations and conclusions of paragraph V of the petition through the quotation from the transportation Act, 1920, ending at the bottom of page

7 of the petition and alleges that the remaining portion of that paragraph is mere argument and surplusage.

III

United States admits the allegations and conclusions contained in paragraphs VI, VII and VIII of the petition, with this exception: It has no knowledge of the purpose of the modification of the petitioner's original proposal to construct the line of railroad mentioned in said paragraph VI, and therefore neither admits nor denies such allegation.

IV

United States denies paragraph IX of the petition in so far as it alleges or suggests that the Commission's certificate and order are against the weight of evidence. As to the remaining language of that paragraph beginning at the bottom of page 12 of the petition United States says: [fols 98 & 99] it is mere argument and contains no allegation but merely attempts to restate what is stated in the Commission's report. Therefore, United States denies everything in said paragraph which is contrary to and in conflict with the report of the Commission which is annexed to and filed with the petition as Exhibit III.

V

United States denies the allegations and conclusions of paragraph X of the petition.

VI

United States has not sufficient knowledge to form a belief concerning the allegations of paragraph XI and as to them it neither admits nor denies.

VII

United States denies the allegations and conclusions of paragraph XII.

VIII

Except as herein expressly admitted, United States denies the truth of each and every allegation contained in

the petition in so far as they conflict either with the allegations herein, or with the statements or conclusions of fact included in said report and order of the Commission.

Wherefore, having fully answered, defendant prays that the petition be dismissed at the cost of the plaintiff and for such other and further order as may be appropriate.

Elmer B. Collins, Elmer B. Collins, Special Assistant to the Attorney General. William J. Donovan, William J. Donovan, the Assistant to the Attorney General. James Damron, James Damron, United States Attorney.

Duly sworn to by Elmer B. Collins. Jurat omitted in printing.

[fol. 100] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed December 27, 1928

The Interstate Commerce Commission, hereinafter called the Commission, intervening defendant in the above-entitled cause, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petition contained, for answer thereunto or unto so much or such parts thereof as the Commission is advised is material for it to make answer unto, answers and says:

I

Answering paragraphs I, II, and III of the petition, the Commission admits that the allegations contained therein are true.

II

Answering paragraph IV of the petition, the Commission admits that applications of purport and tenor substantially as set out in paragraph IV of said petition were filed with

the Commission and were duly received and docketed by the Commission. The Commission denies that the map filed as Exhibit 1 with the petition herein correctly shows the portion of West Virginia in which are situated the lines of railroad of the several applicants before the Commission, or their parent companies or the principal streams and mountains of said territory.

III

Answering paragraph V of the petition, the Commission admits that the applications aforesaid were filed under [fol. 101] paragraphs 18-20, inclusive, of section 1 of the Interstate Commerce Act, as amended by Transportation Act, 1920, and that the language of paragraphs 18, 19 and 20 of said Act is correctly quoted in said petition; but the Commission denies that the purpose of Congress in enacting said paragraphs as declared by the Supreme Court and heretofore recognized by the Commission, is adequately or correctly set out by the plaintiff in said paragraph V of the petition.

IV

Answering paragraph VI of the petition, the Commission admits that the allegations therein contained are true, except that the Commission disclaims information sufficient to form a belief as to the purpose or reason for the modification by the plaintiff of its original proposal before the Commission, as alleged in said paragraph of the petition, and the Commission therefore neither admits nor denies the allegations of said paragraph relative thereto.

V

Answering paragraph VII of the petition, the Commission admits that the allegations therein contained are true, and that a correct copy of the report, and certificate and order of the Commission is filed by the plaintiff with the petition as Exhibit 3 thereto.

VI

Answering Paragraph VIII of the petition, the Commission admits that the allegations therein contained are true.

VII

Answering paragraphs IX to XII, inclusive, of the petition, The Commission admits and alleges that it made and entered and served upon all of the parties to the Commission proceeding, the report and order of July 23, 1928, which are referred to in paragraphs IX and X of the petition, copies whereof are included in the petition as Exhibit 2 thereto.

The Commission further admits and alleges that prior to the making, entering, and serving of said report and order as aforesaid, it accorded to the parties to said proceeding, including the plaintiff herein, the full hearings [fol. 102] provided for in the interstate commerce act; that at said hearings a large volume of testimony, and other evidence bearing upon the matters covered in the said order and report, was submitted to the Commission for consideration, on behalf of said parties, including the plaintiff herein, by their respective counsel; that at said hearings questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, whereupon the Commission determined said matters and made and entered said report and order which included the Commission's decisions, conclusions, and orders in the premises; that upon the evidence before it, as shown in and by said report and order, the Commission made the findings and stated the conclusions upon which said order is based. The Commission further alleges that such findings and conclusions were and are, and that each of them was and is, fully supported and justified by the evidence before the Commission in said proceeding.

Further answering said paragraphs IX to XII, inclusive, of the petition, the Commission denies that petitioner would either suffer irreparable injury or any other legal injury for the reason set out in said petition, or for any other reason, unless said order is set aside and annulled by the court.

The Commission further alleges that in making said report and order, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf

of the parties to said proceeding by their respective counsel, including all matters covered by the allegations of the petition herein.

The Commission further alleges that in making said order, it did not act either arbitrarily, or unjustly or contrary to the relevant evidence, or without evidence to support its action in the premises; that in making said order, the Commission did not exceed the authority duly conferred upon it, or exercise that authority in an unreasonable manner; and the Commission denies each of and all the allegations to the contrary contained in said petition.

[fols. 103 & 104] Further answering the allegations of paragraphs IX to XII, inclusive, of the petition, the Commission alleges and states that at the present there exist competitive outlets over lines of the plaintiff and the Norfolk and Western for the transportation of westbound coal produced in and adjacent to the upper Guyandot Valley; that the purpose of the Commission's order, taken as a whole, is, among other things, to provide more convenient and economical outlets for said coal westbound via the Virginian's proposed extension and the lines of either the plaintiff or the Norfolk and Western; that the Commission considered together and as a unified project the construction of the line along the Guyandot River, certificate for which has issued to the Virginian, and the construction of the connection between the Virginian's extension and the main line of the Norfolk and Western, and determined that the carrying out of the project as a whole would be in the public interest, and that, if the Virginian's proposed extension is to be built, the authorizing of the connection between the said extension and the Norfolk and Western will be essential to preserve the existing status with respect to competitive outlets.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in said petition, in so far as they conflict either with the allegations herein, or with the statements or conclusions of fact included in said report and order of the Commission, which are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove, as this Honorable Court shall

direct, and hereby prays that said bill of complaint be dismissed.

Interstate Commerce Commission, by Nelson Thomas.

Duly sworn to by Johnston B. Campbell. Jurat omitted in printing.

[fol. 105] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FILING ANSWER OF I. C. C. ET AL., ETC. — JAN. 3, 1929

On January 3, 1929, pursuant to notice duly given, came the parties above named, by counsel; and thereupon the Interstate Commerce Commission, by counsel, tendered its intervention and entered its appearance herein, which were received and noted, and tendered its answer herein, and the Guyandot and Tug River Railroad Company and the Norfolk and Western Railway Company, by counsel, likewise tendered their answer herein; and the United States of America, by counsel, likewise tendered its answer herein; and all the said answers, so tendered, were duly received and filed.

And thereupon the plaintiff, by counsel, tendered a duly certified copy of the records in the several proceedings lately pending before the Interstate Commerce Commission, known as Finance Dockets Nos. 4818, 5161, and 6067, which said records were certified by twenty four separate certificates, numbered from 1 to 24, inclusive, attached to the several portions of said record indicated by the said [fol. 106] certificates respectively, and by a separate certificate, No. 25, to which last mentioned certificate were attached carbon copies of said certificates numbered 1 to 24, and which said certificate numbered 25 is in the words and figures following, to-wit:

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the documents referred to in the attached twenty four copies of certificates, the originals of which I have this day signed, constitute all of the record before the Interstate Commerce Commission in Finance Dockets Nos. 6067, Construction of Line by Virginian & Western Railway, 5161, Construction of Line by

Guyandot & Tug River Railroad Company, and 4818, Proposed Construction of Lines by Chesapeake & Ohio Railway Company, except Exhibits Nos. 1 and 2 of the return to questionnaire of the Virginian & Western Railway Company filed in Finance Docket No. 6067, Exhibit "D" of the return to questionnaire of the Guyandot & Tug River Railroad Company filed in Finance Docket No. 5161, and the grade profile filed with the return to questionnaire No. 2 of the Virginian Railway Company in Finance Docket No. 4818, and of the briefs filed by the parties to the proceedings in said finance dockets.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 2nd day of January, A. D. 1929.

George B. McGinty, Secretary of the Interstate Commerce Commission. (Seal.)

[fol. 107] And it is ordered by the Court that the clerk of this Court do identify said certificates by writing on each of the same the words "Filed January 3, 1929" followed by his signature.

And the Court, being of the opinion that the matters and things excepted by said certificate No. 25 as parts of the records in the Finance Dockets aforesaid not included in the matter so certified, namely:

Exhibits Nos. 1 and 2 of the return to questionnaire of the Virginian & Western Railway Company filed in Finance Docket No. 6067, Exhibit "D" of the return to questionnaire of the Guyandot and Tug River Railroad Company filed in Finance Docket No. 5161, and the grade profile filed with the return to questionnaire No. 2 of the Virginian Railway Company in Finance Docket No. 4818, and the briefs filed by the parties to the proceedings in said finance dockets,

are not in fact parts of said records, and are not material to be considered in this case, and no party hereto asserting the contrary, doth so decide, and doth order that the said record so tendered and certified by said certificates 1 to 25 be received as a full, complete, and perfect copy of the records in said Finance Dockets 4818, 5161, and 6067, to which decision by the Court no party objected or excepted; and the same is accordingly done.

[fol. 108] And thereupon the Court heard the testimony of witnesses offered by the plaintiff in its behalf, namely: Ross S. Marshall and I. L. Pyle, and doth direct that the transcript of the testimony of the said witnesses be identified by the clerk of this Court by endorsement over his signature; and no other testimony being offered by any other party to this cause the case was thereupon fully argued by counsel for all the parties thereto.

And upon request of counsel for the defendant United States of America, and for said intervener, the Interstate Commerce Commission, leave is granted them to file briefs herein within ten days from the date of this order, copies of said briefs to be delivered to the other parties to the cause.

Thereupon, by agreement of all parties hereto, by counsel, the case was submitted to the Court for its decision as on final hearing; and the Court not being at present advised of its judgment herein doth take time to consider further thereof.

Elliott Northcott, U. S. Circuit Judge. W. E. Baker, U. S. District Judge. Geo. W. McClintic, U. S. District Judge.

[fol. 109] In United States District Court

No. 2379

The Chesapeake and Ohio Railway Company, Plaintiff,

vs.

United States of America, Guyandot and Tug River Railroad Company, and Norfolk and Western Railway Company, Defendants, and Interstate Commerce Commission, Intervener.

Suit by The Chesapeake and Ohio Railway Company Against the United States and Others Wherein the Interstate Commerce Commission Intervened.

Decree for Defendants—Filed Nov. 16, 1929

Herbert Fitzpatrick, Robert B. Tunstall, George H. Gardner and Thomas L. Preston, Richmond, Virginia, and

Fitzpatrick, Brown & Davis, Huntington, West Virginia, for Complainant.

James Damron, United States District Attorney, Huntington, West Virginia, and Elmer B. Collins, Special Assistant to the Attorney General, Washington, D. C., for the United States.

Daniel W. Knowlton and Nelson Thomas, Washington, D. C., for Intervener, Interstate Commerce Commission.

John H. Holt, Huntington, West Virginia, Robert E. McCabe, Charleston, West Virginia, D. Lynch Younger, Washington, D. C., and Theodore W. Reath, Philadelphia, Pa., for Defendants, Guyandot and Tug River Railway Company and Norfolk and Western Railway Company.

Before Northcott, Circuit Judge, and Baker and McClintic, District Judges.

OPINION

McCLINTIC, District Judge:

The Chesapeake and Ohio Railway Company, (hereinafter referred to as the C&O), filed its petition in this court against the United States of America, Guyandot and Tug River Railway Company and Norfolk and Western Railway Company, under the provisions of the Urgent Deficiencies Act of October 22d, 1913, to set aside and annul that portion of the certificate and order of the Interstate Commerce Commission authorizing the Guyandot and Tug River Railway Company, a subsidiary of the Norfolk and Western Railway Company, to build a line of railroad from Gilbert to Wharncliffe, in Mingo County, West Virginia.

[fol. 110] For convenience the Norfolk and Western Railway Company and its subsidiary, the Guyandot and Tug River Railway Company, will hereinafter be referred to as the N. & W. The Virginian Railway Company and its subsidiary, the Virginian and Western Railway Company, while not a party to this suit, will necessarily have to be referred to many times, and for convenience will be called the Virginian.

In order to make a proper setting for the decision of this cause it will be necessary to make a rather full statement of facts,, and in doing that it will be necessary to give a somewhat detailed description of the country wherein the proposed railroad is to be built and the connections proposed to be made therewith.

The part of the territory of West Virginia south of Kanawha and New Rivers therein is underlaid with enormous quantities of coal. The C. & O., N. & W. and Virginian are the only railroads that haul to market the vast amount of coal shipped from the mines in that part of the State of West Virginia. The C. & O., with its main line and its subsidiaries, serves that portion thereof immediately below the Kanawha and New Rivers. The N. & W. runs along the Big Sandy River and its branch, the Tug River, which rivers form the boundary line between the States of West Virginia and Kentucky. Each of these railroads has a tidewater connection at Hampton Roads, the eastern terminus of the C. & O. being at Newport News and the eastern terminus of the N. & W. at Norfolk, Virginia.

The N. & W. also has western connections in the cities of Cincinnati and Columbus in the State of Ohio. The C. & O. has western connections in the cities of Cincinnati, Chicago, Columbus and the great lake region. The Virginian runs westerly from Norfolk, Virginia, to the coal fields of Southeastern West Virginia a distance of about four-hundred and fifty miles. Each of these railways has many branches running from their respective lines in Southern West Virginia. The branches of the Virginian are in Mercer, Wyoming and Raleigh Counties. The Virginian has no western connections of its own, and such products as originate on its line going west must be transferred either [fol. 111] to the C. & O., which connects with it at Pemberton, on one of its branch lines, or at Deepwater, on its main line, or such products must be transferred to the N. & W. at Matoaka, on one of its branch lines.

By a decision of the Interstate Commerce Commission, (for convenience hereinafter called the I. C. C.), which decision is found in 96 I. C. C., 359 and 98 I. C. C., 488, and which was affirmed by the Supreme Court of the United States, 272 U. S. 658, the Virginian was compelled to adopt and file joint rates with the C. & O. and N. & W. respectively

for the coal shipped west from its line. A large number of mines located on the Virginian are likewise accessible to branch lines of the C. & O., and a large number of these mines located on the Virginian can only ship coal by the Virginian. For some reason best known to the shippers, about eighty per cent of the coal shipped west from the lines of the Virginian was routed via Matoaka and the N. & W. line.

There is a river called the Guyandot which has its head, with many branches, in the southeasterly portion of West Virginia, and which flows westerly into the Ohio River at Huntington, West Virginia. About thirty years ago the C. & O. commenced the construction of a branch line from Barboursville, ten miles east of Huntington on the main line of the C. & O., up this Guyandot River, and subsequently extended the same to a place called Gilbert, in Mingo County, West Virginia, which point is about nin-ty miles from Barboursville. This line has developed an enormous coal shipment and delivers to the C. & O. at Barboursville, on the main line, about thirty-five percent of all the coal shipped on the C. & O. lines. The C. & O. also has a branch line which leaves the main line at Prince, in Fayette County, West Virginia, and extends southeasterly to a place called Stonecoal, which point is about fifty-five miles from Gilbert, both places being situate on the waters of the Guyandot River. The N. & W. has the branch line to Matoka, and other branch lines extending north from its main line to or near to the Guyandot River. The Virginian has its main line at a place called Mullins and another place called Elmore, on the head of the Guyandot River. The Virginian also has a line extending from Elmore down [fol. 112] the Guyandot River to a place called Itmann. All of these lines are in what is called the New River, Tug River and Pocahontas Coal Districts, and, under the decision of the I. C. C., carry the same freight rate on coal going west.

From the joint coal mines which are served by the C. & O. and the Virginian if the coal is shipped west by the C. & O., the Virginian has no division of rates. The distance from Itmann to Gilbert is about forty miles. There is no railroad line along this river between those two points. The distance from Gilbert to Wharncliffe, on the main line

of the N. & W., is about ten and one-half miles. The valley of the Guyandot is narrow and quite mountainous between Gilbert and Mullins. The water flows through a narrow, crooked valley or gorge, in which there is but little level land. This part of the river is located a distance of eight to twelve miles north of the N. & W. main line, from which it is separated by a high Mountain divide. The Guyandot basin between Itmann and Gilbert is estimated to contain about three hundred and thirty square miles, nearly all underlaid with coal. The coal commercially marketable and recoverable under present conditions is variously estimated to be a quantity not less than fixe hundred million gross tons and up to one billion, four hundred forty-four million short tons. It is also estimated that there is about one hundred and eighteen square miles of land bearing merchantable saw timber at least twelve inches in diameter, which it is thought will produce about three hundred and fifty-five million feet, board measure, of timber, nearly all hardwood.

The important resources of the region, for which all of this development is being made, are the coal and the timber, and the full exploitation thereof will require the construction of branch lines on the principal tributary creeks, notably on Clear Fork, north of the river, and on Pinnacle Creek, south of the river, as well as on several smaller creeks; but large areas of coal and timber can be reached from the proposed main line along the river by ordinary industrial spurs therefrom.

A company called the Pocahontas Coal & Coke Company owns a great many thousands of acres of this coal and timber land. About the end of the year 1901 the N. & W. [fol. 113] purchased all the stock of the Pocahontas Coal & Coke Company, and thus is the beneficial owner of these holdings of the Coal & Coke Company. The W. M. Ritter Lumber Company owns about seventy thousand acres of this coal and timber land along the Guyandot River in this basin. There are some other owners thereof therein, but the quantities are comparatively small.

On the seventh day of May, 1925, the C. & O. filed its application with the I. C. C. (Finance Docket 4818), for a certificate that the present and future public convenience and necessity required the construction by it of (a) an extension of its line of railroad known as the Logan subdivision,

from the southern terminus of said division, at or near Gilbert, easterly to a point at or near Mullins, a distance of forty-seven and three-tenths miles, in Mingo and Wyoming Counties, West Virginia; and (b) an extension of its Winding Gulf branch from its southern terminus at or near Stonecoal westerly to a point at or near Mullens, eight and two-tenths miles, in Raleigh and Wyoming Counties. Permission was also requested under paragraph eighteen of section 15a of the act to retain the excess earnings from the proposed extensions. On October 29th, 1925, the Guyandot & Tug River Railroad Company filed its application in Finance Docket No. 5161 for a certificate that the present and future public convenience and necessity require the construction by it of a line of railroad extending from a connection with the Virginian Railway at or near Elmore in a general westerly direction to Wharncliffe, fifty-three miles, in Wyoming and Mingo Counties. The Norfolk & Western and the Virginian joined in this application. An amended application was filed December 24th, 1925, which was joined in by the Norfolk & Western only. On January 21st, 1927, the Virginian & Western Railway Company filed its application for a certificate that the present and future public convenience and necessity require the construction by it of a line of railroad extending from a connection with the Guyandot River branch of the Virginian Railway at or near Itmann, down the Guyandot River to a connection with the Chesapeake & Ohio at or near Gilbert, forty and six-tenths miles, in Wyoming and Mingo Counties. This application was joined in by the Virginian Railway Company. The [fol. 114] three applications were heard together, and by a certificate and order made by the I. C. C. on the 23d day of July, 1928, the I. C. C. granted the application of the Virginian to construct its line from Itmann to Gilbert. It also granted the application of the N. & W. to build its line from Gilbert to Wharncliffe. It denied the application of the N. & W. as to all other matters, and denied the entire application of the C. & O. 145 O. C. C. 167.

This decision was by Division Four of the I. C. C. This division was unanimous in granting the Virginian its application; but one Commissioner out of the three members of such Division Four filed a dissenting opinion and did not join in the decision granting the application of the N. & W. to build the short line from Gilbert to Wharncliffe. Appli-

cation was made to the whole Commission for a re-hearing and re-argument, but the same was denied and the order of the I. C. C. became final and was placed in full force and effect as of the first day of November, 1928.

It is claimed by the N. & W. that the line from Gilbert to Wharncliffe will develop a large quantity of coal at a point rather near to Gilbert and on the north side of the range of mountains between the Guyandot and the Tug Rivers. It is claimed by the C. & O. that this quantity of coal could be as well or better developed by a short line from the C. & O. line on Guyandot River. It is shown that the line from Gilbert to Wharncliffe will cost about two million, six hundred thousand ($2,600,000) dollars, and that development of a good bit of coal on a creek called Horsepen would require a line of railroad costing about six hundred thousand ($600,000) dollars.

The prayer of the petition is that the part of the certificate and order granting the N. & W. the right to extend its line of railroad from Gilbert to Wharncliffe may be enjoined, suspended and annulled, and that the N. & W. may be enjoined from taking any proceedings or doing any act or thing under or pursuant to the action and order of the Commission.

The pleadings in the cause consist of the petition and the exhibits therewith, which petition includes the report of the Commission, 145 I. C. C. 167, the answer of the N. & W. and the answer of the United States. The record includes certain evidence on behalf of the parties taken in open [fol. 115] court and the record in full of all the evidence submitted to the I. C. C. on the application hereinbefore mentioned.

The petition of the plaintiff sets forth two grounds of attack upon the order of the I. C. C. appealed from herein.

The first ground, in substance, is as follows:

That the record before the I. C. C. contained no evidence that the present or future public convenience or necessity requires or will require the construction and operation of the railroad by the N. & W. from Gilbert to Wharncliffe; and that, on the contrary, the evidence shows that such construction and operation are and will be contrary to the present and future public convenience and necessity.

The second ground, in substance, is as follows:

That the report of the I. C. C. and the record show that the I. C. C. made and entered the certificate and orders "without authority either in law or in fact, contrary to law, and arbitrarily, in that the said certificate and orders were made and *and* entered under an erroneous conception and theory of the law applicable in such cases, and in contravention of the Intrastate Commerce Act."

The plaintiff avers in this context that "no finding of fact is made in support of the said certificate and orders, and the only reasons or purported reasons assigned" by the Commission "in support thereof are that the construction of the proposed line would enable the N. & W. to compete with the plaintiff for westbound traffic from the Guyandot Valley, and would assure operators in that territory competitive service to the west."

It should be borne in mind in considering these objections that the applications of the C. & O., N. & W. and Virginian for the opening of the westbound outlet through the upper Guyandot River Valley were heard together and that all three applications were disposed of at one time by one order, and that the I. C. C., as shown by the report and order, considered and decided the proposition before it as a whole, and not by piecemeal.

In this order in question the I. C. C. denied the application of the C. & O. in toto, granted the application of the [fol. 116] Virginian in full and denied the application of the N. & W. as to the line along the upper Guyandot Valley, but granted its application as to that portion of its proposed line which would connect the Virginian extension therein authorized with the N. & W. main line at Wharncliffe (145 I. C. C. 167). Paragraph (20) of section one of the I. C. C. Act gives to the I. C. C. power to issue a certificate for the construction of a portion of the line for the building of which a certificate is sought. The applicable portion of such paragraph is as follows:

"The commission shall have power to issue such certificate as prayed for or to refuse it; or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to

the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require."

It will be noted that no specific limitation, restriction or direction is found in the statute for the guidance of the I. C. C. in the issuance of the certificates. The I. C. C. is authorized to issue a certificate attaching "such terms and conditions as in its judgment the public convenience and necessity may require." The judgment of the I. C. C. as to the requirements of the public convenience and necessity is the only prescribed basis in the conditions which may be attached to the certificate. Apparently the issuance of the certificate itself is in the discretion of the I. C. C. as broadly as are the conditions which may be attached to such issuance.

It may therefore be fairly stated that the issuance of the single order authorizing the Virginian and the N. & W. to build these separate sections of the lines which the I. C. C. found to be necessary to a proper disposition of the traffic problem of the upper Guyandot Valley, was equivalent to the giving of a certificate to each of the applicants named for the building of the prescribed portion of the line, conditioned upon the building of the other portion. It may be fairly presumed that the I. C. C. would not have authorized the building of either of the sections of road without the simultaneous construction of the other. In this [fol. 117] connection attention is called to the fact that according to the order issued, both sections were required to be completed on or before December 31, 1934, thus implying that the I. C. C. visualized the connection of the Virginian's westward extension with the N. & W. simultaneously with its connection with the C. & O.

That the elimination of the Gilbert-Wharncliffe branch from the plan contemplated in the order of the I. C. C. would utterly change the situation and result in an entirely different disposition of the problem before the I. C. C. cannot be questioned. The chief contention of the plaintiff is that the building of the Virginian extension would afford a westbound outlet for coal produced upon the Virginian line different and more desirable than those now existing, and that with the elimination of the Gilbert-Wharncliffe

construction sought to be enjoined in this suit, a much larger proportion of the westbound coal would be carried to its ultimate destination over the C. & O. The plaintiff also sets out and complains of the fact that with the building of the Gilbert-Wharncliffe connection considerable portions of this Virginian coal moving over the Virginian extension would be consigned to its ultimate destination via the N. & W. This, in effect, would result in continuation of approximately the same conditions now existing.

The statute gives the I. C. C. power to authorize the building of a portion of a proposed line. The I. C. C. has power to separate and divide a line described in an application for a certificate. No authority, however, is given to the courts to separate and divide a line authorized by the I. C. C. in an order, and such an action by the courts would clearly constitute a substitution of the court's opinion upon the subject for that of the I. C. C. Certainly it cannot be doubted that if the I. C. C. had, in one order, after the joint hearing of these three applications, seen fit to grant to the N. & W. the right and authority to construct the railway line down the Guyandot valley from Itmann or a point beyond to Gilbert instead of to the Virginian, and then have granted the further application of the N. & W. to construct the Gilbert-Wharncliffe line, then no court would have power to separate and divide the last line from the first and enjoin its construction. The order here in [fol. 118] contemplation of the statute must, in our opinion, be enjoined as a whole or not at all. The plaintiff in this case has so brought its suit that the order as a whole cannot here be enjoined. It is not necessary for an order to be supported by substantial evidence that every part and portion of a proposed line would be to the public interest. It is sufficient that there be substantial evidence justifying a conclusion that the plan and project as a whole would be to the public interest. No decided case can be found wherein a court has sustained the order of the I. C. C. as to one portion of an authorized line and enjoined its effectiveness as to the other portions. The obvious reason that no court has ever attempted such action is the fact that it would in effect substitute the opinion and plan of the court for that of the I. C. C. Cases holding that the courts will not do this are numerous and uniform.

Among the many available cases, we here append quotations from a few which set out the well-established principle.

The rule as to judicial review of the Commission's findings and orders is stated as follows by the Supreme Court in United States v. New River Co., 265 U. S. 533, a case involving car distribution rules as applied to joint coal mines:

> The authority conferred upon the Commerce Court by section 207 of the Judicial Code was vested in the District Courts by the Act of October 22, 1913, and, like the authority previously exercised by the Federal Circuit Courts, is confined to determining whether the Commission's order violates the Constitution, or exceeds the power delegated by Statute, or is an exercise of power so arbitrary as virtually to transcend the authority conferred. Kansas City Southern Ry. Co. v. United States, 231 U. S. 423, 439; Manufacturers Ry. Co. v. United States, 246 U. S. 457, 483, 489. See also Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452, 470; Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541, 547; Intermountain Rate Cases, 234 U. S. 476, 490; Skinner & Eddy Corporation v. United States, 249 U. S. 557, 562.
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> The courts will not review determinations of the Commission made within the scope of its powers or substitute [fol. 119] their judgment for its findings and conclusions. Interstate Commerce Commission v. Illinois Central R. R., Supra, 470; Interstate Commerce Commission v. Union Pacific R. R. Co., Supra, 547; Kansas City Southern Ry. v. United States, Supra, 456; United States v. Louisville & Nashville R. R. Co., 235 U. S. 314, 320; Manufacturers Ry. Co. v. United States, Supra, 488.

In Manufacturers Ry. Co. v. United States, 246 U. S. 457, the court said at page 481:

> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (Interstate Commerce Commission v. Alabama Midland Ry. Co., 168

U. S. 144, 170), and upon which its decisions, made the basis of administrative orders operating in futuro, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power."

The court in that case further said, at page 482:

* * * "It may be conceded that the evidence would have warranted a different finding; indeed the first report of the Commission was to the contrary; but to annul the Commission's order on this ground would be to substitute the judgment of the court for the judgment of the Commission upon a matter purely administrative, and this can not be done."

We are of opinion that there is sufficient evidence in the record, as it is in substance set out in the report of the I. C. C., covering all details of the movement of traffic and coal production in the locality involved, and this affords a basis sufficient in law to support the conclusions and order of the I. C. C.

The claim made by the plaintiff that there is no evidence of record to support the finding of the I. C. C. that the present and future public convenience and necessity require the construction by the N. & W. of that portion of its proposed line in Mingo and Wyoming Counties, West Virginia, extending from Gilbert to Wharncliffe, is not supported by the record. We are of opinion that there are a number of items of evidence showing this public convenience and [fol. 120] necessity.

First. The proposed line is necessary for the development, in the future, of the coal-bearing lands tributary to such proposed line from Gilbert to Wharncliffe on Gilbert and Horsepen Creeks. There is substantial evidence that in this ten and one-half miles from Gilbert to Wharncliffe there is a large tonnage of mineable coal which witnesses estimated to be from one hundred and twenty million to one hundred and seventy-five million tons, and there is evidence of witnesses to show that this can best be developed by the Gilbert-Wharncliffe line or by a short branch extending from that line up Horsepen Creek. The I. C. C.

found this to be true, and we cannot substitute our judgment thereon, even if there were substantial evidence to the contrary. This will, of course, be a matter of future development, but the law authorized the issuance of a certificate upon a finding by the I. C. C. that the present or future public convenience and necessity require or will require such construction.

Second. The evidence shows clearly that the Gilbert-Wharncliffe line is necessary in order to accomplish economies in operating costs in connection with traffic now moving by way of other lines of the N. & W., and that these economies cannot be accomplished without the construction of this short line. It must be remembered that the greater part of the traffic which is expected to move over the line which the Virginian has been authorized to construct from Itmann to Gilbert will be coal originating on existing lines of the Virginian Railway and destined to be hauled west, and which is now moving over other routes at the rate of about four million tons a year and is expected to increase in volume. That coal originates at mines on existing lines of the Virginian which are either local to its rails or served jointly by the Virginian and C. & O. From the local mines, and from the joint mines which are directly intermediate, there are joint rates by way of the rails of the Virginian in connection with both the C. & O. and N. & W. through Deepwater and Matoaka respectively. From twenty-seven other joint mines there are likewise joint rates in connection with the N. & W. by way of Matoaka, but the C. & O. has refused to join with the Virginian in establishing [fol. 121] joint rates by way of Deepwater because it has its own rails all the way from those mines to the western markets.

The coal shippers from this region, for reasons of their own, have heretofore caused about eighty per cent of all westbound coal originating on the Virginian to be moved by way of Matoaka and the N. & W., and the I. C. C., in giving its approval to the Gilbert-Wharncliffe line, has declined to deprive these shippers of the continued opportunity to use the N. & W. lines. If the Gilbert-Wharncliffe line is not built, then the existing routes by way of Matoaka must be continued. To the extent that the shippers continue to use the Matoaka route, the use of the Itmann-Gil-

bert line of the Virginian will be curtailed and the participating carriers will be unable to accomplish the operating economies which would result from the use of that route.

It further appears that if this short line is not constructed, by reason of this possible or probable shipment of coal west over the present lines of the N. & W., the Virginian would suffer great loss in not having the revenue from the shipment of this coal over the new line from Itmann to Gilbert.

Third. The construction of the proposed Gilbert-Wharncliffe line is necessary *to* order to preserve the existing competitive status of the N. & W. and C. & O. for the westbound movement of coal originating on existing lines.

In Paragraph four of Section five of the Interstate Commerce Act, the I. C. C. is directed, as soon as possible, to prepare and adopt a plan for the consolidation of the railroad properties of the continental United States into a limited number of systems. From that paragraph we quote as follows:

"In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible, and wherever practicable, the existing routes and channels of trade and commerce shall be maintained."

The N. & W. and C. & O. are active competitors for the shipment of this amount of four million tons, heretofore mentioned, which now originates on the Virginian lines to the west. Naturally, the Virginian would want to have the longest haul possible of this tonnage, and would therefore like to haul it from the point of origin of each ton [fol. 122] to the end of its line at Gilbert. Without the construction of the Gilbert-Wharncliffe line, all of this coal tonnage would have to be delivered at Gilbert to the C. & O. The construction of this short line would leave the C. & O. and N. & W. upon the same competitive basis as they are at present, and would give to the Virginian what the I. C. C. evidently thought was their rightful portion of the revenue derived from the shipment of this coal. This is simply carrying out the apparent public policy indicated by Congress by the passage of the Interstate Commerce Act.

It is claimed by the plaintiff that the C. & O. affords the "natural" and most economical route for the movement west from Gilbert, and characterizes the proposed Wharncliffe route as a "poor" one, having "heavy grades" and being uneconomical and wasteful, but the I. C. C. evidently found to the contrary, and in our opinion, when all the facts are taken into consideration, there is no doubt about the rightfulness of its conclusions. It is true that the grade from Gilbert over the proposed route to Wharncliffe is greater than any grade over the C. & O. lines from Gilbert to Kenova, but the I. C. C. evidently took into consideration many other matters affecting it and reached the conclusion that, on the whole, this was not a sufficient reason to refuse the certificate granting the right to construct this short line. We deem it unnecessary to go into all the details relative to this objection. The I. C. C. certainly reached the conclusion that the construction of the Gilbert-Wharncliffe line should be authorized to preserve both routes on an equal competitive basis.

Fourth. The I. C. C. was evidently of the opinion that the construction of the new short line was necessary to enable the N. & W. to participate in the coal, lumber and other traffic originating along or destined to points on the new line to be built by the Virginian from Itmann to Gilbert. The language of the I. C. C. on this point is as follows:

"The construction of that part of the N. & W. proposed line from Wharncliffe to Gilbert would enable the N. & W. to compete with the C. & O. for westbound traffic from the Guyandot valley, and would assure operators in this territory competitive service to the west. The N. & W. might [fol. 123] be disposed to permit the exploitation of the lands of the Pocahontas Company, provided it receives the westbound tonnage therefrom at Wharncliffe."

As heretofore set out, the N. & W. is the owner of a very great acreage of land in the Guyandot valley and has been such owner for at least twenty-eight years, and had contemplated developing the same whenever the necessity therefor should appear, and has spent a large sum of

money in maintaining rights-of-ways and in engineering and other matters necessary for the proposed construction of a railroad in the Guyandot valley, and the declared purpose of the purchase of this large quantity of land was to make the N. & W. "secure in its coal and coke traffic which already forms so large a portion of the company's business." If the N. & W. refused to permit the development of its lands in this valley unless all the products thereof that go west were returned east to its branch line at Matoaka and then hauled west over its main line, it would seriously interfere with the expected business of the Virginian Railway and would be an uneconomical way of taking these products to market. The I. C. C. evidently reached the conclusion that by the burden of the ownership of this large body of land for this great length of time, certain rights accrued to the N. & W., and in our opinion equity, at least, requires agreement with such conclusion.

The desirability of competitive service for the purpose of hauling the products of this Guyandot valley to market certainly seems to have been considered by the I. C. C. in awarding the certificate for the construction of the Gilbert-Wharncliffe line, and it seems to us that the fact that it was so considered is clear from its report.

Fifth. The I. C. C. evidently considered that the new line from Gilbert to Wharncliffe was necessary to prevent the bottling-up of the Virginian by having only one active western outlet. As heretofore shown, the Virginian is a trunk line railroad extending from Hampton Roads, Virginia, to and ending in *to* the coal fields of Southern West Virginia. The I. C. C., in the case of Control of Virginian Railway, 177 I. C. C., 67, refused to approve the proposed lease of its properties to the N. & W. We think that the right construction of this act of the I. C. C. is to believe [fol. 124] that the Virginian should be preserved independently of the two other major coal-carrying lines in that vicinity.

The I. C. C. also required (Virginian Railroad v. United States, et al., 272 U. S. 658), "* * * the establishment of joint rates on coal to the west and the evidence in the case was that that traffic is or will in the future be an important part of the Virginian's total traffic."

The I. C. C., by awarding the certificate for the Itmann-Gilbert line to the Virginian, apparently endeavored to give it a more suitable and effective outlet to the west. But it would still be bottled-up if the only connection at Gilbert was with the C. & O., and the authorization of the Gilbert-Wharncliffe line seems to have been a means, in the minds of the members of the Commission, to prevent such condition. The I. C. C. evidently considered the Gilbert-Wharncliffe certificate as a corollary to the certificate awarded the Virginian, and its construction is a necessary part of the very theory and object of the I. C. C. in the development of the Virginian as an independent trunk-line carrier.

In the report in this case the I. C. C. lays real stress on the fact that the coal reserves of the C. & O. and N. & W. are much greater than those of the Virginian, and also lays stress on the fact that the coal reserves of the C. & O. are likewise much larger than those of the N. & W.

From the Ohio River, at Kenova and Huntington respectively, run the lines of the N. & W. and C. & O. southeast along the valley of the Big Sandy River and the Guyandot River. The N. & W. leaves the state near Bluefield (about one hundred and eight miles from Kenova) and the C. & O. stops at Gilbert, more than ninety miles from its main line, and there is no cross railway between them for those long distances. The same condition will prevail when the Virginian is finished from Itmann to Gilbert on its line of more than forty miles. We are of opinion that it is to the interest of the public within that long distance to have a cross line for the purpose of carrying freight and passengers of local people from one railway to the other without the necessity of making these long hauls to the Ohio River on one railway and then back up the other when the distance between these railways in these two valleys is so [fol. 125] short.

Believing that there is substantial evidence herein to support the certificate and order of the I. C. C. and the power and authority to grant the certificate and enter the order complained of was lawfully lodged in the I. C. C. and that the action of the Commission is neither in law or fact arbitrary or contrary to law or in contravention of the Interstate Commerce Act, a proper decree will be

drawn and presented dismissing the petition of the plaintiff.

I concur. W. E. Baker, U. S. Dist. Judge.
I concur. Elliott Northcott, U. S. Circuit Judge.

[fol. 126] In United States District Court

No. 2379

The Chesapeake and Ohio Railway Company, Plaintiff,

v.

United States of America, Guyandot and Tug River Railroad Company, and Norfolk and Western Railway Company, Defendants, and Interstate Commerce Commission, Intervening Defendant

Final Decree—Dec. 14, 1929

This cause having been, by order of January 4, 1929, submitted to the Court for decision as on final hearing on the application for permanent injunction, and such hearing having been held and the arguments and briefs of counsel for the parties having been heard and considered, and the Court having reached the conclusion, for the reasons set forth in its opinion filed herein, that the relief prayed in the petition should be denied:

It is, therefore, ordered, adjudged and decreed, that the relief prayed by plaintiff be, and the same is hereby denied, and the petition is hereby dismissed.

This 14th day of December, 1929.

Elliott Northcott, United States Circuit Judge.
W. E. Baker, United States District Judge. Geo. W. McClintic, United States District Judge.

[fol. 127] In United States District Court

[Title omitted]

Petition for Appeal—Filed Dec. 14, 1929

The above-named Petitioner, being aggrieved by the final order or decree of the above-entitled Court, heretofore

made and entered on the 14th day of December, 1929, hereby appeals from said order or decree to the Supreme Court of the United States of America, for the reasons specified in the Assignment of Errors filed herewith; and Petitioner prays that this appeal may be allowed, and that citation be issued as provided by law, and that a transcript of the records, proceedings and documents upon which said decree was based, duly authenticated, be transferred to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

Your Petitioner further prays that proper order be made relating to the security to be required of it.

Dated December 14, 1929.

Herbert Fitzpatrick, Robt. B. Tunstall, Geo. H. Gardner, Thomas L. Preston, Fitzpatrick, Brown & Davis, Attorneys for Petitioner.

[fol. 128] In United States District Court

[Title omitted]

Assignment of Errors—Filed Dec. 14, 1929

Comes now the Petitioner above named and presents this Assignment of Errors, and says that in the record and proceedings in the above-entitled case and the decree (hereinafter referred to as "the decree") made and entered against it therein on the 14th day of December, 1929, there is error in the particulars hereinafter set forth, that is to say:

I

The Court erred in making the decree.

II

The Court erred in making the decree and dismissing the petition, because the action of the Interstate Commerce Commission, described and complained of in the Petition on file herein and hereinafter referred to as "the action of the Commission", is void and of no effect because the record made before the Commission contains no evidence

that the present or future public convenience and necessity require or will require the construction of the line of railroad in said Petition prayed to be enjoined.

[fol. 129]

III

The Court erred in making the decree and dismissing said petition, because the action of the Commission is void and of no effect in that the record before the Commission, and the report of the Commission, affirmatively show that said construction is and will be contrary to the present and future public convenience and necessity.

IV

The Court erred in making the decree and dismissing said petition, because the action of the Commission is without authority at law, contrary to law, arbitrary and void in that it was based upon an erroneous conception and theory of the law, and in contravention of the Interstate Commerce Act.

V

The Court erred in making the decree and dismissing said petition, because its action in that behalf was based upon (1) alleged reasons stated by the Commission and concurred in by the Court, and (2) alleged reasons not stated by the Commission, but nevertheless found and stated by the Court; and none of said reasons shows or tends to show any present or future public convenience or necessity for the construction of the line of which the construction is herein sought to be enjoined.

VI

The Court erred in making the decree and dismissing said petition, in so far as its action in doing so was based upon reasons stated by the Commission, because the said reasons of the Commission and its action based thereon rested upon an erroneous conception and theory of the law and are in contravention of the Interstate Commerce Act, in that (as affirmatively appears from the report of the Commission, said reasons and action were solely based [fol. 130] upon the naked findings that the construction

thereby authorized would promote competition between carriers and assure competitive service, and were unsupported by any finding or any such fact of record asserting, proving, or tending to prove that such promotion of competition or assurance of competitive service was or will be required by present or future public convenience or necessity within the meaning of the Interstate Commerce Act.

VII

The Court erred in making the decree and dismissing said petition, in so far as its action in doing so was based upon reasons which, though not stated by the Commission, were found and stated by the Court, because, as appears from the opinion of the Court filed herein, the only reasons, in addition to those stated by the Commission and mentioned in Assignment VI, for which the Court held the action of the Commission to be supported by the record, were:

(a) that the construction authorized by said action would originate traffic;

(b) that operating economies would be accomplished by said construction; and

(c) that an additional western outlet would be supplied and a new connection between existing or proposed lines of railway afforded;

which grounds are in fact and in law insufficient to sustain the decision of the Court because:

(a) the record wholly fails to show, and the Commission did not find, that any present or future public convenience or necessity would be subserved by reason of any origination of traffic by said construction;

[fol. 131] (b) the record wholly fails to show, and the Commission did not find, that any operating economies would be accomplished as the result of said construction, and the record affirmatively proves not only that no operating economies would be accomplished as the result of said construction, but that the effect thereof would be to place the burden of added operating expenses upon the national transportation system; and

(c) the record wholly fails to show, and the Commission did not find, that present or future public convenience or necessity require or will require the additional western outlet or the new connection between other existing or proposed lines of railway which would be afforded by said construction.

VIII

The Court erred in making the decree and dismissing said petition, because, as appears from its opinion filed herein, the only ground, in addition to those hereinbefore referred to, upon which the Court based its decision sustaining the action of the Commission was the Court's holding that authorization of construction other than that complained of in said Petition was inseparable from, dependent and contingent upon, the construction in said Petition sought to be enjoined; whereas, the Commission did not so find, and the record conclusively proves that no authorization of any construction other than the construction in said Petition sought to be enjoined was in anywise inseparable from, dependent or contingent upon the construction so sought to be enjoined.

Wherefore the Petitioner above named prays that the said decree entered herein on the 14th day of December, 1929, be reversed, with directions that the injunction be is-
[fol. 132] sued in accordance with the prayers of the said petition and that there be granted such other and further relief as may be appropriate.

Herbert Fitzpatrick, Robt. B. Tunstall, Geo. H. Gardner, Thomas L. Preston, Fitzpatrick, Brown & Davis, Attorneys for Petitioner.

[fol. 133] In United States District Court

[Title omitted]

Order Allowing Appeal

The Petitioner in the above-entitled suit, having prayed for the allowance of an appeal in the above-entitled case

to the Supreme Court of the United States from the decree made and entered in the above-entitled suit by the above-entitled Court on the 14th day of December, 1929, and from each and every part thereof, and having presented and filed its Assignment of Errors pursuant to the statutes and rules of the said Court in such case made and provided;

It is hereby ordered that Citation be issued as provided by law and that a transcript of the records, proceedings and papers upon which said decree was based, duly authenticated, be transferred to the Supreme Court of the United States under the rules of said Court in such cases made and provided;

And it is further ordered that security for costs on appeal be fixed in the sum of One Thousand Dollars.

Dated December 14, 1929.

Elliott Northcott, United States Circuit Judge. W. E. Baker, United States District Judge. Geo. W. McClintic, United States District Judge.

[fol. 134] Bond on appeal for $1,000, approved December 14, 1929, omitted in printing.

[fol. 135] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ENLARGING TIME TO PREPARE STATEMENT ON APPEAL

Good cause appearing therefor, it is hereby ordered that the Petitioner in the above-entitled suit may have, and it is hereby allowed, to and including February 14, 1930, within which to prepare and lodge in the Clerk's office of this Court a statement of the evidence and file with said Clerk a præcipe in accordance with Equity Rule 75 upon appeal from the decree of the above-named Court made and entered herein on the 14th day of December, 1929, and

to docket the said appeal and file the record therein with the Clerk of the Supreme Court of the United States.

Dated December 14, 1929.

Elliott Northcott, United States Circuit Judge. W. E. Baker, United States District Judge. Geo. W. McClintic, United States District Judge.

[fols. 136-138] Citation, in usual form, showing service on James Damron et al., omitted in printing.

[fol. 139] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

To the Honorable Howard B. Lee, Attorney General of the State of West Virginia:

You are hereby notified that on the 14th day of December, A. D. 1929, the appeal of the Pettiioner to the Supreme Court of the United States in the above-entitled suit was allowed from the decree of the above-named Court, dismissing the petition of said Pettiioner in said suit; that said Petitioner has filed with the above-named Court the bond required by said order, and that the citation issued, pursuant to the provisions of said order, a copy of which is hereto attached, has been made returnable within 30 days from the date thereof.

This notice is given to you, pursuant to the Urgent Deficiencies Act, October 22, 1913, (38 U. S. Stat. L. 219, 221).

Dated December 14, 1929.

Herbert Fitzpatrick, Robt. B. Tunstall, Geo. H. Gardner, Thomas L. Preston, Fitzpatrick, Brown & Davis, Attorneys for Petitioner.

[fol. 140] (Acceptance of Service)

Legal and timely service of the within notice of appeal is hereby acknowledged this 19th day of December, 1929.

Howard B. Lee, Attorney General for the State of West Virginia.

[fol. 141] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

To the United States of America, Interstate Commerce Commission, Guyandot and Tug River Railroad Company, and Norfolk and Western Railway Company, or their attorneys

Please take notice that the Petitioner in the above-entitled suit has appealed and does hereby appeal to the Supreme Court of the United States from the final decree of the above-entitled Court heretofore made herein and entered on the 14th day of December, 1929, and from each and every part thereof.

Attached hereto are copies of the Petition for Appeal, Assignment of Errors, Order Allowing Appeal, and Citation.

Dated December 14, 1929.

Herbert Fitzpatrick, Robt. B. Tunstall, Geo. H. Gardner, Thomas L. Preston, Fitzpatrick, Brown & Davis, Attorneys for Petitioners.

[fol. 142] Acceptance of Service

Service of the within Notice of Appeal is hereby accepted this the 20th day of December, 1929, for and on behalf of the United States of America, to have the same effect and none other as if served by the United States Marshal for the Southern District of West Virginia.

James Damron, United States Attorney.

Acceptance of Service

Legal and timely service of the within Notice of Appeal and copies of the papers therein mentioned is hereby acknowledged this 14th day of December, 1929.

Guyandot & Tug River Railroad Co. and Norfolk & Western Railway Co., by Robt. E. McCabe of Their Counsel.

[Title omitted]

DISTRICT OF COLUMBIA, ss:

Geo. T. McNamara, being duly sworn, deposes and says that he is and was at the time of service of the papers herein referred to a citizen of the United States, over the age of twenty-one years, and that he is and was at said [fol. 143] time a duly qualified deputy United States marshal in and for the District of Columbia and legally authorized to serve court process in said District.

That deponent personally served the annexed notice of appeal, petition for appeal, assignment of errors, order allowing appeal and citation in the above-entitled case on the Interstate Commerce Commission by delivering to and leaving with Nelson Thomas, General Counsel of the Interstate Commerce Commission, in person true copies of said notice of appeal, petition for appeal, assignment of errors, order allowing appeal and citation on the 27th day of December, 1929.

Geo. T. McNamara, Deputy U. S. Marshal, District of Columbia.

Subscribed and sworn to before me this 28th day of December, 1929. Lillian A. Trammell, Notary Public, D. C. My Commission expires March 23, 1933. (Seal.)

[fol. 144] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed January 3, 1930

To the Clerk of the above-entitled Court:

You will please prepare transcript of record in this cause to be filed in the office of the Clerk of the Supreme Court of the United States for use on appeal to the Supreme Court of the United States, and you will please incorporate in such transcript the following portions of the record in this cause:

1. Petition and exhibits filed therewith;

2. Intervention of the Interstate Commerce Commission;

3. Answer of Guyandot and Tug River Railroad Company and Norfolk and Western Railway Company;

4. Answer of the United States of America;

5. Answer of the Interstate Commerce Commission;

6. Order entered on January 3, 1929;

[fol. 145] 7. Opinion of the Court;

8. Final Decree made and entered on December 14, 1929;

9. Petition for Appeal filed December 14, 1929;

10. Assignment of Errors filed December 14, 1929;

11. Order made and entered December 14, 1929, allowing appeal from final Decree;

12. Bond on appeal from final Decree;

13. Order made and entered December 14, 1929, enlarging time until and including February 14, 1930 to prepare and lodge in the Clerk's office a Statement of the Evidence and to file therein a præcipe, and to docket the Appeal and file the record therein with the Clerk of the Supreme Court of the United States;

14. Citation issued on appeal from final Decree;

15. Notice of appeal directed to Attorney General of the State of West Virginia, filed December 23, 1929, together with acknowledgment of service thereof.

16. Notice of appeal directed to Defendants and Intervening Defendant, filed December 14, 1929, together with acknowledgment of service thereof and of copies of Petition for Appeal, Assignment of Errors, Order Allowing Appeal, and Citation;

17. Statement of Evidence at final hearing, filed December, 1929, together with order approving the same;

18. Præcipe for transcript of record;

19. Clerk's certificate of transcript of record.

[fol. 146] Said Transcript to be prepared as required by law and the rules of the Supreme Court of the United States.

The original citation with the proof of service thereof by the Defendants and Intervening Defendant should accompany the Transcript.

Dated December 23, 1929.

Herbert Fitzpatrick, Robt. B. Tunstall, Geo. H. Gardner, Thomas L. Preston, Fitzpatrick, Brown & Davis, Attorneys for Petitioner.

Acceptance of Service

Legal and timely service of a copy of the within præcipe for transcript of record is hereby acknowledged this 27th day of December, 1929.

Theodore W. Reath, Attorney for Guyandot and Tug River Railroad Company and Norfolk and Western Railway Company. Elmer B. Collins, Attorney for United States of America. Nelson Thomas, Attorney for Interstate Commerce Commission.

[fol. 147] In United States District Court

[Title omitted]

Præcipe of United States of America, Guyandot and Tug River Railroad Company, and Norfolk and Western Railway Company, Defendants-Appellees, and Interstate Commerce Commission, Intervenor-Appellee, for Additional Portions of the Record to be Incorporated into the Transcript of Record—Filed January 3, 1930

To the Clerk of the United States District Court for the Southern District of West Virginia:

The above-described Defendants-Appellees and Intervenor-Appellee hereby file with the Clerk this Præcipe that they desire additional portions of the record incorporated into the transcript as follows, to wit:

A copy of the record in the proceedings before the Interstate Commerce Commission in Finance Dockets Nos. 4818, Proposed Construction of Lines by The Chesapeake and Ohio Railway Company; 5161, Construction of Line by Guyandot and Tug River Railroad Company; and 6067, Construction of Line by Virginian and Western Railway Company; which said record was duly certified by twenty-five certificates of the Secretary of the Commission, and which record and certificates were offered by the Chesapeake and Ohio Railway Company, Petitioner-Appellant herein, in the District Court at the hearing of this case and admitted in evidence and marked Plaintiff's Exhibits No. 1 to 25 inclusive.

[fol. 148] The above-described Defendants-Appellees and Intervenor-Appellee are content to have the testimony in the said Exhibit Nos. 1 to 25 inclusive as offered in this Court reproduced in the exact words of the witnesses.

Elmer B. Collins, Special Assistant to the Attorney General for the United States of America, Defendant-Appellee. John H. Holt, Robt. E. McCabe, D. Lynch Younger, Theodore W. Reath, Solicitors for Guyandot and Tug River Railroad Company and Norfolk and Western Railway Company, defendants-Appellees. Nelson Thomas, Attorney for Interstate Commerce Commission, Intervenor-Appellee.

January 3, 1930.

[fol. 149] In United States District Court

[Title omitted]

Motion of United States of America, Guyandot and Tug River Railroad Company, and Norfolk and Western Railway Company, Defendants-Appellee, and Interstate Commerce Commission, Intervenor-Appellee, to Supplement the Transcript of Record—Filed January 3, 1930

Come now the United States of America, Guyandot and Tug River Railroad Company and Norfolk and Western Railway Company, Defendants-Appellees, and Interstate Commerce Commission, Intervenor-Appellee, and move this Court to require by appropriate order that the Chesapeake and Ohio Railway Company, Petitioner-Appellant herein, shall supplement the transcript of record in the way and to the extent covered by the Præcipe of these Defendants-Appellees and Intervenor-Appellee this day filed.

Under Rule 75 of the Equity Rules the Chesapeake and Ohio Railway Company as Petitioner-Appellant is charged primarily with the duty to furnish a simple, condensed and narrative statement of the evidence or reproduce the evidence in the exact words of the witnesses if either party should so desire and the Court should so direct.

The grounds for this Motion are now to be presented as follows:

[fol. 150]

I

The Defendants-Appellees and Intervenor-Appellee above described base this Motion upon the universal practice of the Supreme Court to require all the material evidence upon which an order of the Interstate Commerce Commission was entered to be set forth verbatim or stated in simple, condensed and narrative form, when a review of such order is sought.

II

Defendants-Appellees and Intervenor-Appellee show that the Chesapeake and Ohio Railway Company, Petitioner-Appellant, seeks to have the record confined to the findings of facts appearing in the report of the Interstate Commerce Commission, supplemented by the "Statement of the Evidence" heretofore filed by it. Defendants-Appellees and Intervenor-Appellee show that the record so constituted would not be a reproduction of the evidence either in the words of the witnesses or in a simple, condensed and narrative form as required by Rule 75 of the Equity Rules. Instead it would seek to substitute for the evidence required by Rule 75 findings of fact by the Interstate Commerce Commission, supplemented by the "Statement of the Evidence." A record so constituted would not contain all of the material evidence taken before the Interstate Commerce Commission upon which the order sought to be enjoined was based.

III

Defendants-Appellees and Intervenor-Appellee show that the "Statement of the Evidence" proposed by the Petitioner-Appellant is confined (see p. 5) to a "Condensed Statement of the Evidence and Exhibits before the Commission in Finance Dockets Nos. 4818, 5161, and 6067 not adequately stated in the Report or by the Allegations of the [fol. 151] petition admitted in the answers." Thus the "Statement of the Evidence" proposed by the Petitioner-Appellant's Præcipe seeks to substitute the evidence or facts stated in the report of the Commission or by the alle-

gations of the petition admitted in the answers for the evidence taken by the Commission.

IV

The Defendants-Appellees and Intervenor-Appellee show that one of the grounds upon which the Petitioner-Appellant seeks a review of the decision of this Court is that the order of the Commission "is void and of no effect because the record made before the Commission contains no evidence that the present or future public convenience and necessity require or will require the construction of the line of railroad in said petition prayed to be enjoined": Assignment of Error No. 11. The existence of substantial evidence in the record before the Interstate Commerce Commission can only be determined by the Supreme Court of the United States, as it was in this Court, upon a record which contains all of the evidence upon which the Interstate Commerce Commission acted and made its order.

V

Defendant-Appellees and Intervenor-Appellee show that another of the grounds upon which it is sought to review the decision of this Court is that it erred in holding that the "authorization of construction other than that complained of in said petition was inseparable from, dependent and contingent upon, the construction in said petition sought to be enjoined": Assignment of Error VIII. The question raised by this Assignment of Error is whether the order is one and indivisible, and that question can not be determined by the Supreme Court without having before [fol. 152] it all of the evidence as to all the lines proposed to be constructed as taken in the hearing of the consolidated cause by the Interstate Commerce Commission.

VI

Defendants-Appellees and Intervenor-Appellee show that in several of the Assignments of Error (particularly No. VII) it is alleged that the decision of the Court is erroneous because founded upon facts not shown by the record before the Commission and not found as facts by the Commission

in its report. The Petitioner-Appellant seeks to confine the record in the Supreme Court to the statements of facts as appearing in the Commission's report supplemented by its "Statement of the Evidence." These Assignments of Error can not be considered or determined in the Supreme Court on the record proposed by the Præcipe of the Petitioner-Appellant, which would not contain all the evidence before the Interstate Commerce Commission.

Elmer B. Collins, Special Assistant to the Attorney General for the United States of America, Defendant-Appellee. John H. Holt, Robt. E. McCabe, D. Lynch Younger, Theodore W. Reath, Solicitors for Guyandot and Tug River Railroad Company and Norfolk and Western Railway Company, Defendants-Appellees. Nelson Thomas, Attorney for Interstate Commerce Commission, Intervenor-Appellee.

January 3, 1930.

[fol. 153] In United States District Court

[Title omitted]

Order Extending Time—Jan. 18, 1930

The appellant having, on Dec. 23, 1929, lodged in the Clerk's office of this Court a præcipe and statement of the evidence in this case and notified the appellees or their solicitors of such lodgment, and having named January 3, 1930 and the courtroom of this Court at Charleston, West Virginia, as the time and place when it would ask the Court to approve the said statement, the appellees appeared before the Court at Charleston, West Virginia, on January 3, 1930 and filed their præcipe in opposition to that filed by the appellant, and moved that the appellant be required to state in condensed form the entire transcript of the evidence and exhibits herein; but the Court overruled the said motion and directed the appellees to prepare and submit to the Court on or before January 17, 1930, a memorandum pointing out the specific evidence and specific exhibits which the appellees might deem necessary to complete the state-

ment of the evidence so lodged by the appellant, avoiding the duplication of matter set forth in the statement so filed by the appellant, and of matter set forth in the report of the Interstate Commerce Commission in Finance Dockets Nos. 4818, 5161 and 6067, and of matter admitted by the pleadings; and the appellees excepted to the said ruling of the Court;

[fol. 154] And, thereafter, on January 17, 1930, without waiving their objection aforesaid, the appellees filed with the Court their memorandum, a copy of which is hereby directed to be filed herein and marked Exhibit A; setting forth the specific evidence and exhibits which they deemed necessary to have included in condensed form, and the appellant likewise filed its responses to the several requests embodied in the memorandum, the statement of which responses is likewise herewith directed to be filed herein and marked Exhibit B; and thereupon, the matter being fully argued, the Court directed the appellant to include in its condensed form within the statement of the evidence all of the items set forth in the memorandum so filed by the appellees except those covered by paragraphs Nos. 6, 15, 16, 19 and 36, and except that only so much of the evidence and of Exhibit No. 26 mentioned in Items 7 and 8 should be included as relates to the year 1927, to which ruling of the Court the appellant, deeming the said matter superfluous and improper to be included under Equity Rule 75, excepted; and, upon motion of the appellant, the Court granted it the right to include any other portions of the record the inclusion of which may be necessary by reason of the inclusion of the matters embraced in the memorandum filed by the appellees and directed to be included by the Court;

And, good cause appearing therefor, it is further ordered that the appellant may have, and it is hereby allowed, a further period to and including March 15, 1930 within which to prepare and lodge, in the Clerk's office of this Court, its statement of the evidence made up as hereinabove directed, and to file with the Clerk of this Court a praecipe on appeal in accordance with Equity Rule 75, and to docket the said appeal and to file the record therein with the Supreme Court of the United States.

Dated January 18, 1930.

Elliott Northcott, Geo. W. McClintic.

Seen: Nelson Thomas, Attorney for Interstate Commerce Commission. D. Lynch Younger, for N. & W. Ry. Co. and Guyandot and Tug River R. R. Co.

[fol. 155] Exhibit "A"

MEMORANDUM OF ADDITIONAL EVIDENCE WHICH APPELLEES DESIRE INCLUDED IN THE RECORD—Filed January 18, 1930

(1) Page 6 of the "Statement of the Evidence" refers to the stipulation upon the record by all the parties that all of the testimony and transcripts might be referred to by the parties in connection with each application. The Examiner's suggestion, assented to by all parties, should be reported verbatim, i. e. (Tr. p. 6):

"I think to keep this record clear, it ought to be stipulated that all of the testimony and the transcripts will be available for the use of all parties; also for use of the Commission. That is, that all parties can refer to any testimony or statements in the transcripts as long as they relate to the one general subject.

* * * * * * *

"The record will show that it is stipulated by all parties that all evidence taken in the transcript shall be equally available to all parties and may be considered by the Commission in disposing of each and all of the applications."

(2) Page 6 of the "Statement of the Evidence" refers to the Examiner's announcement that the applications would be heard in the order in which they were filed—first the C. & O., then the Guyandot and then the V. & W. It should also be stated that the evidence in support of their applications and in opposition to each other application was presented by each carrier as a unit (Tr. p. 274).

(3) Joint rates on coal from mines on the Virginian to western destinations have been established (a) via Virginian-Deepwater-C. & O., and (b) via Virginian-Matoaka-N. & W., but in publishing those rates via the route first

named, the Virginian covered only the destination territory that was involved in the cases known as I. C. C. Docket Nos. 13832 and 14454. It "has refused to establish via Deepwater and the Chesapeake & Ohio the New River District bases of rates on coal from their mines to Western and Northwestern territories. These through rates had been established from the Virginian, via Matoaka, W. Va., and the Norfolk & Western Railway subsequent to the original [fol. 156] complaints to the Commission referred to, and are now in effect. The Virginian and the Chesapeake & Ohio both serve the Winding Gulf territory with their own rails.

"The Virginian publishes rates from mines on its Winding Gulf Branch via Deepwater and the Chesapeake & Ohio to comply with Section 4 of the Act to Regulate Commerce, but from their Stone Coal Branch, which is served only by the rails of the Virginian, and to which the Chesapeake & Ohio has access through Virginian service, the Virginian does not publish rates via Deepwater and the Chesapeake & Ohio. * * *

"The effect is that it forces the coal shippers on the Virginian Railway to send the greater part of their coal west by way of Matoaka and the Norfolk & Western, as in so moving the coal can be reconsigned en route under through rates to points west of Chicago and the Mississippi River, whereas if the same coal moved by way of the Chesapeake & Ohio it would have to be eventually sold at some point to which a through rate applied via the Deepwater gateway.

"The privilege of being able to consign coal to Chicago, for illustration, and of being able to reconsign to a point west at a through rate is of very great benefit and advantage to the coal man in Chicago, and hence he must confine the routing of coal via Deepwater and the Chesapeake & Ohio to that which he has actually sold and on which final shipping instructions are given the mine at time of shipment." (Witness Hull, Tr. pp. 130-134.)

(4) Witness Hull testified (Tr. pp. 136-139) on the subject of competition. We desire that testimony in narrative form or in the exact words of the witness, including the fol- [fol. 157] lowing which should be reported verbatim:

"The construction of the proposed extension by the Chesapeake & Ohio would provide a route for coal originating at the mines served by the Chesapeake & Ohio and Virginian Railway in the New River field as against the route via Matoaka and the Norfolk & Western. Inasmuch as coal already moves in large quantities via this latter route it seems to me that the provision of a line offering shorter distances and more favorable grades would of necessity further the public interest by providing more effective competition of this character."

(5) Mr. Hull testified, on cross-examination, (Tr. pp. 140-141) that the reasons why no joint rates are published via the Virginian-Deepwater-C. & O. route, from joint mines served by both the C. & O. and Virginian, to the west, is that the C. & O. having its own route from those mines has refused to join the Virginian in the establishment of joint rates via the Deepwater route.

(6) Witness Marshall (Tr. pp. 159-160) testified that one of the chief purposes and functions of the proposed C. & O. line in Guyandot Vallley, is to furnish additional, better and more economical service to the public in the following way:

"The extensions connecting with each other at or near Mullens will connect the Winding Gulf Branch with the Logan Division and form a continuous line of railway along the entire length of the Guyandot River; thus providing a natural and the most economical outlet through the channel formed by the valley of the Guyandot for the low volatile coal tonnage produced in the winding Gulf section and moving to the markets north of the Ohio River."

(7) Witness Marshall (Tr. pp. 161-170) testified with regard to the location of mines in the New River and Winding Gulf field, the production and movement of coal from those mines, the rates, the existing routes, the natural routes, his division of those mines into eighteen sections or groups, etc. That testimony should be included in the record, either in narrative form or verbatim, insofar as it [fol. 158] is necessary to an understanding of the situation discussed and Exhibit No. 26 filed by him.

(8) Witness Marshall filed Exhibit No. 26 "Coal Tonnage" which should be included in the record in its entirety.

(9) Witness Marshall filed Exhibit No. 27 "Transportation Savings" which should be included in the record in its entirety.

(10) Witness Marshall testified (Tr. pp. 173-192) describing the computations of costs made by him for the several routes, upon which was based the claimed savings in transportation costs. That testimony should be included in the record either verbatim or, if in narrative form, in sufficient detail to show the final results of his computations for the several routes and that the following are characteristics of his computations: (a) the study assumes movement via C. & O. direct or via the new line and the C. & O. of all Virginian westbound coal traffic which has in the past moved via Virginian-Matoaka-N. & W.; (b) the study purports to develop train service costs based upon three factors, i. e., grades and distance, train loads and train speed; (c) the experience of the C. & O. as to train loading was used on its existing lines, but the actual experience of the N. & W. and Virginian was not ascertained; (d) the train speed on the Virginian and N. & W. was not ascertained but estimated; (e) electric operations of the Virginian and the N. & W. were ignored; (f) the comparisons end at Kenova; (g) the helper engine mileages used are in some instances the one-way mileage alone, while in other instances it is the total mileage; (h) the unit costs used in the computation of train service costs are those of the C. & O.; (i) the computation does not take into account via the C. & O. Gilbert route the return movement of empties via that route between Peach Creek and Stone Coal [fol. 159] junction; (j) assumes a through movement over the Valley Line and on to Peach Creek, without interchange at Gilbert; (k) the claimed savings in cost of repairs and depreciation of cars is lower per unit than the cost to the C. & O. shown in Exhibit 27; (l) based the computation of car time upon the results of a test on the C. & O. and applied the results to N. & W. and Virginian without ascertaining the facts; (m) made allowances for cross-haul of loads on the N. & W. Matoaka route.

(11) Witness Marshall (Tr. pp. 196-197) testified:

"Q. Could the Chesapeake & Ohio after constructing such extensions and connection with the Virginian Railway at a cost of $10,104,300 established that plan of operation and secure the total amount of savings to which you have testified?

"A. No. First, it could not make that plan of operation effective without the cooperation of the Virginian Railway in affording a connection at Itmann and in establishing through rates and divisions via that junction to the west, and, second, the full amount of the savings could not be obtained without the operation of through train service between Elmore Yard on the Virginian and Peach Creek yard on the Chesapeake & Ohio. Any other method of handling through business between these yards, involving interchange at an intermediate point, would be more expensive than the plan proposed."

(12) Witness Marshall (Tr. pp. 197-198) testified:

"Q. Can the Virginian carry out the purposes contemplated in its application without making certain cooperative arrangements? And I mean when I say the Virginian to also include the Virginian & Western.

"A. No. It would be necessary for the Virginian to make connection with the Chesapeake & Ohio at Gilbert and establish thru rates and divisions both westbound and eastbound, including westbound rates via Stone Coal Junction and Gilbert for Chesapeake & Ohio coal traffic with respect to which the Virginian would be an intermediate carrier between two parts of the Chesapeake & Ohio. Moreover, the Virginian could not operate trains between Elmore Yard and Peach Creek, the most economical arrangement, without running over the Chesapeake & Ohio tracks betwen Gilbert and Peach Creek nor could it effect interchange at Gilbert without providing interchange facilities, the cost of which it estimates at $500,000. The one thing the Virginian can do without co-operative arangements of the things which it proposes is to develop the territory adjacent to the proposed line for eastbound business only; it could not develop this territory for westbound business—and the major [fol. 160] portion of the business will move west—without a westbound outlet and joint rates and divisions thereover."

(13) Witness Alden testified (Tr. pp. 212-215) with regard to the acquisition by the N. & W. of the stock of the Pocahontas Coal & Coke Co., substantially as follows: The Pocahontas Coal & Coke Co. was chartered October 11, 1901, and its charter was amended December 31, 1901. The N. & W. purchased substantially all the stock of that company in 1901. Prior to 1901, the Pocahontas Coal & Coke Company was organized by parties interested in the United States Steel Corporation. During or before the year 1901 that company acquired the coal bearing lands formerly owned by the Flat Top Coal Land Association and some adjacent coal lands in the territory traversed by the N. & W. Its holdings in 1901 were a large part of the lands in the Pocahontas coal field. The report was current in 1901 that the coal producing interests of the C. & O. and B. & O. had each been consolidated and this made important a friendly control of the Pocahontas Company by the N. & W. in order to prevent the building of competing lines of railway into the Pocahontas field, which lines were unnecessary to develop the traffic and would have been economically wasteful. *The* could only be done through ownership and control of the lands in the Pocahontas fields. The future interests of the railway company required that the Pocahontas field should be controlled by the company and not by interests independent of the company or adverse to the company. It appeared that there would be great danger of the invasion of the N. & W. territory by other lines of railroad, if other interests adverse to the company controlled the Pocahontas field, and that this danger would be averted and the company secured in its coal traffic by the purchase of the Pocahontas Coal & Coke Company. The purchase, as a collateral matter, involved also the location on the lines of [fol. 161] the railway company of a large coal operation by the United States Steel Corporation. The N. & W. accordingly purchased the stock of the Pocahontas Company and contemporaneously, as a part of the general policy of securing the existing and future tonnages of coal for transportation, promoted the project of a railroad down the Guyan Valley from Elmore to Gilbert, and thence to Wharncliffe. The charter of the Guyandot & Tug River Railroad Company was secured, the organization perfected and construction commenced. The Pocahontas Coal & Coke Company

had coal areas in Guyan Valley and there were other coal areas near Wharncliffe which will be or have been described by our other officials. Those areas were to create reserve tonnages for the future.

(14) Witness Alden filed as Exhibits Nos. 30, 31 and 32 copies of the charter of the Pocahontas Company and copies of extracts from the minutes of N. & W. Board meetings which considered the acquisition of the stock of that company. Those exhibits need not be reproduced in full if there is reproduced enough to show (a) that the Pocahontas Company is a land holding company, without power under its charter to engage in mining, selling or shipping of coal, and (b) that the minutes of the Board meeting contained a report of the Executive Committee which described the reasons for the acquisition as follows:

"In considering this matter, your committee have realized its great importance to the future interests of your company. In the quality of the coal and coke, thickness of seam, economy of operation and extent of the deposit, the Pocahontas Coal Field is admittedly without a superior. Should this vast property, producing millions of tons of coal and coke annually, be controlled independently of your Company, or by interests adverse to your Company, there would be grave danger that your territory would be invaded by other lines of Railway, and this danger would increase with the increase in the development of coal and coke. On the other hand, with this property controlled by your Company, this danger will be averted and your Company will be secure in its coal and coke traffic which already forms so large a portion of your Company's business and which is [fol. 162] certain to increase in importance year by year."

(15) Witness Alden testified (Tr. p. 227) that news of the consummation of the proposed Virginian lease to the N. & W. was publicly announced April 22, 1925.

(16) Witness Huff (Tr. p. 229) testified with regard to the proposed new lines of the C. & O. that "One of the chief purposes of the present application is the provision of a westbound route for the handling of this coal" (meaning the westbound coal originated by the Virginian) "which

will be shorter and more economical than any existing route."

(17) Witness Marshall (Tr. pp. 233-236) testified with regard to 915,117 tons of coal originated by the Virginian and moved westbound in nine months of 1927, from mines in the New River Watershed. That coal moved via Matoaka and N. & W. Mr. Marshall testified that there were available from those mines to the west routes via the C. & O. direct which he considere the natural channels and better than the proposed C. & O. route down Guyandot River; yet for some reason the shippers forwarded that coal via the Virginian-Matoaka-N. & W. route. He does not include that tonnage for movement over the Elmore-Gilbert line in making his estimates of transportation savings.

(18) Witness Marshall testified (Tr. pp. 236-238) that in making his computations of operating savings he considered as available for movement over the Valley Line all the tonnage naturally tributary to that line, whether originating on the Virginian or C. & O. and whether moved via C. & O. direct, Virginian and C. & O. or Virginian and N. & W. He did not mean to convey the impression that the route by Matoaka would be closed, but he based his estimates of probable tonnages upon the movement that has occurred in the past via both C. & O. and N. & W. [fol. 163] routes. And unless the tonnage is diverted from the Matoaka route, or some new tonnage is developed to replace it, there will not be available for movement over the Valley line the volume of traffic estimated, and the transportation savings claimed could not be accomplished.

(19) Mr. Marshall testified (Tr. pp. 238-239) that his investigations into the expectable traffic, costs, and economies of the valley line, were not made until after the announcement of the Virginian lease by the N. & W.

(20) Mr. Marshall testified (Tr. pp. 239) as follows:

"*A.* Now I understand, Mr. Marshall, in making your estimates and in getting at your locomotive rating, train haul and so forth, you have entirely disregarded the actual conditions existing today—that is, after portions of the

Virginia and portions of the Norfolk & Western have been electrified?

"A. Yes, sir.

"Q. And you have assumed the use over all the sections of track in respect to which you made comparisons of locomotives of the C. & O. standard type, your 2-6-6-2?

"A. Yes, sir.

"That is your Mallet locomotives?

"A. Yes, sir.

"And not among your most powerful Mallets?

"A. No, we have a limited number of Mallet locomotives that have a greater tractive power than that one.

"Q. Now assuming the same motive power in use over all tracks in respect to which you made comparisons, your comparisons simmer down practically, do they not, to comparisons of distances and grades?

"A. Yes."

(21) Mr. Marshall testified (Tr. pp. 250, 251, 252) as follows:

"Q. Would it not also be practicable to handle the amount of tonnage that you have estimated to begin with—that is substantially three million or four million tons per annum—eastbound and westbound with the relatively small interchange yard near where the tracks join at Gilbert?

"A. * * * the interchange facilities that would be required at Gilbert would be relatively small compared with the facilities such as the B. & O. and the Virginian had at other places. I used the figure of $500,000 which is shown in the Virginian return but the operation, if I may say so, by having an interchange yard at Gilbert would not be as economical as the through movement from Elmore to Peach Creek yard.

"Q. It would be much better to run through from yard to yard?

"Yes, sir."

[fol. 164] "Q. To carry out your scheme the C. & O. has either got to get some trackage rights over the Virginian or the Virginian if it builds it has got to get some trackage rights over the C. & O.?

"A. As related to the through movement?"

(22) Witness Wall testified (Tr. p. 273) that the C. & O. needs additional shop facilities, its Huntington shops are overworked, and work has to be let to contractors?

(23) Witness Wiltsee testified (Tr. pp. 277-278) as follows:

"* * * The proposed line of the Guyandot & Tug River Railroad will be situated in Mingo and Wyoming Counties, West Virginia, and will extend from Wharncliffe on the Norfolk & Western Railway Company to a connection with the Virginian Railway at or near Elmore. The general topography of the country from Wharncliffe to Elmore is mountainous. The proposed lines will follow up Ben Creek from Wharncliffe for 5.2 miles; then through a tunnel 4400 feet in length to Gilbert Creek; thence down Gilbert Creek to the Guyandot River and up that river to Elmore, so that except for said tunnel the line will follow the above named water courses.

"The Ben Creek and Gilbert Creek Valleys are very narrow, with hardly any bottom lands. The surrounding country is mountainous, being mostly wooded, and very little cultivated, fairly well timbered, and underlaid with coal; but the valley of the Guyandot River, though narrow and winding, has a narrow strip of bottom land traversed by the proposed line. This soil is clay with outcropping of sandstone, shale and coal."

(24) Witness Wiltsee filed as Exhibit No. 35 as profile of the proposed lines of the G. & T. R. from Elmore to Wharncliffe.

(25) Witness Wiltsee testified (Tr. pp. 279-280) that a revised estimate of the cost of constructing the Gilbert-Wharncliffe line is $2,600,000.

(26) Witness Wiltsee filed (Exhibit No. 37) the revised estimate of cost of constructing the Gilbert-Wharncliffe line.

(27) Witness Wiltsee testified (Tr. p. 281), referring to the G. & T. R. proposed line:

"There will be one grade adverse to westbound traffic [fol. 165] between Gilbert and Wharncliffe which will have a

maximum grade of 1.04 per cent compensated for curvature at the above rate and will be for a distance of 5.1 miles from Gilbert up to near the summit. The maximum grade eastbound, which will be the direction of the empty coal car movement, between Wharncliffe and the summit will be 1.147 percent compensated."

(28) Witness Wiltsee testified (Tr. pp. 281-2):

"Practically all of the right of way between Elinore and Gilbert has been secured as well as some right of way purchased and grading done on the Wharncliffe end."

"The total expenditure which has been made for right of way, engineering and so forth amounts to approximately $263,000."

(29) Witness Crawford testified (Tr. pp. 316-320) with regard to the establishment of joint rates on coal from Virginian mines to the west, the movement of coal, the routes available over existing lines and over the proposed line of the G. & T. R., and the operating savings via the proposed lines compared with the Matoaka route. That testimony should be reproduced.

(30) Witness Crawford filed (Exhibit No. 50) a chart comparing the profile of the existing route through Matoaka with the profile of a route embracing the proposed lines of the G. & T. R. via Gilbert and Wharncliffe. That profile should be reproduced.

(31) Witness Crawford testified (Tr. pp. 320-321) with regard to the saving which may be accomplished by returning empty coal cars to the Virginian via the proposed Wharncliffe-Gilbert route, instead of via Matoaka. That testimony should be included.

(32) Witness Crawford testified (Tr. pp. 321-322) with regard to the coal to be developed in the Guyandot Valley and the proposed route via Wharncliffe for that coal.

(33) Witness Crawford testified (Tr. pp. 322-323) as to the method of operation over the grade between Gilbert [fol. 166] and Wharncliffe, and on to Williamson, and that the cost of doubling the hill as described would add less than one cent per ton to the cost of operation.

(34) Witness Crawford testified (Tr. p. 328) with regard to the movement of other traffic than coal from the Valley and the route which the proposed line would afford.

(35) Witness Crawford testified (Tr. pp. 328-9) with regard to the routes which would be afforded by the proposed construction for the movement of general merchandise and supplies from the West to the Virginian coal field territory.

(36) Witness Crawford testified (Tr. pp. 331-332) with regard to the business of Williamson, W. Va., and that the proposed line will give jobbers and dealers at that point an opportunity to market their goods in the Virginian Coal Field territory.

(37) Witness Crawford testified (Tr. pp. 333-334) with regard to the branches which will be necessary to develop the coal resources in the territory under discussion, including the Horsepen Branch, and the costs.

(38) Witness Crawford testified (Tr. pp. 335-6) with regard to the route which the new line would afford for the movement of traffic between the West and points in Virginia and the Carolinas, via the Virginian.

(39) Witness Crawford, on cross-examination, testified (Tr. pp. 349-50) further with regard to the method of operation over the grade between Gilbert and Wharncliffe and the cost thereof.

(fol. 167) (40) Mr. Crawford testified (Tr. pp. 353-354):

"Q. Does it not came down to this, Mr. Crawford, that in order to put the Norfolk & Western into the Guyandot Valley you are in effect proposing the construction of two link lines, one from Gilbert to Whatncliffe and one Pinnacle Creek North Fork at a cost of considerably upwards of five million dollars?

"A. Yes, sir. I think if you consider the economics of it, it is necessary to consider that we have owned for a period of 25 years and held for the protection of our railroad 130,000 acres of land in the Pinnacle Valley, and economically that land was purchased and held to protect traffic

on our main line. That main line has a capacity far beyond its present movement, and the low volatile coal near Elkhorn in that original Pocahontas field is becoming rapidly exhausted, so that the logical thing to do is to develop that coal for movement as was always intended to do. . . .

"The testimony heretofore given, and the testimony which some additional witness will give, shows that there is very much business originating in the Guyandot Valley. Of course, it is possible that if the Norfolk & Western had not owned the fee right of way for twenty or more years through the valley and had not bought and owned this land to protect its business, that it might not now be waging this fight; it might be waging a fight or it might have gone to some other territory to protect that business, but it is imperative with the investment we have to protect that business as has always been intended."

(41) Mr. Crawford testified (Tr. pp. 357):

"Q. If the permit were granted the Virginian Railroad to build from Gilbert to Itmann, giving you trackage rights over the line, would your company be willing to build the Wharncliffe-Gilbert branch in order to connect with it?

"A. I do not understand the question.

"(Late question read.)

"Yes, we would.

"Q. (By Mr. de Jarnette) You would be willing to operate with the Virginian on that basis?

"A. Well, I assume that if the Virginian built the line they would give us westbound business at Gilbert."

(42) Witness Dunglinson testified (Tr. pp. 367-371) with regard to the coal bearing lands tributary to the C. & O., N. & W. and Virginian, and gave an estimate of the coals contained in those areas. The testimony should be included.

[fol. 168] 43. Witness Dunglinson filed (Exhibit No. 55) an estimate of the coals tributary to the three lines summarized as follows:

N. & W., 20,948,000,000 tons.
C. & O., 33,671,000,000 tons.

Virginian, 2,318,000,000 tons.
Joint C. & O. Virginian, 1,058,000,000 tons.
Guyan Valley, 3,298,000,000 tons.
All railroads, 61,294,000,000 tons.

Those estimates, at least the summary, should be included.

(44) Witness Dunglinson testified (Tr. pp. 373-374) as follows:

"The Pocahontas Coal & Coke Company, a subsidiary of the Norfolk & Western Railway Company, owns approximately 128 square miles or 82,500 acres in this undeveloped territory, part of the holdings being in the low volatile section and part in the high volatile section. The low volatile section of the Pocahontas Coal & Coke Company's holdings, tracts A and D at the eastern end of the territory, embrace approximately 82 square miles or 52,500 acres, which is 67 per cent of the total low volatile area. The holdings of the Pocahontas Coal & Coke Company in the high volatile section, tract E, on the upper waters of Clear Fork Creek, embrace 46 square miles, or 30,000 acres.

. . . . . .

"There are in that territory 78,500 acres of low volatile coal, of which 52,500 acres, or 67 per cent, are under ownership of the Pocahontas Coal and Coke Company; and 164,500 acres of high volatile coal, of which 30,000 acres, or 18 per cent, are owned by the Pocahontas Coal & Coke Company."

(45) Witness Dunglinson testified (Tr. p. 375) with regard to the tonnages of coal expected to be produced and shipped from the territory served by the main line in the Valley.

(46) Witness Dunglinson testified (Tr. pp. 375-7) with regard to the tonnages expected to be produced and shipped from mines in the Pinnacle Creek section, when a branch up Pinnacle Creek is built.

[fol. 169] (45) Witness Dunglinson testified (Tr. 377-379) as follows:

"The total holdings of the Pocahontas Coal & Coke Company, with the exception of several isolated and small tracts lying in Giles, Pulaski and Montgomery counties, Virginia, which are entirely detached from the main body here under discussion, and also with the exception of not quite 3,000 acres of land in Mingo County, under lease to the railroad company for fuel development, are 293,941 acres. Of this total acreage approximately 119,500 acres lie on the water shed of the Guyan River, this being 40.6 per cent of the total."

These areas outlined in heavy blue lines on Exhibit 56 are the holdings of the Pocahontas Company.

"The holdings of the Pocahontas Coal & Coke Company tributary to the Guyandot River west of Elmore or thereabouts and on the water shed of Clear Fork Branch of the Guyandot River is approximately 27.7 per cent of all the holdings of the Pocahontas Coal & Coke ompany."

(46) Witness Dunglinson testified (Tr. pp. 394-5) that he estimates the minable coal within the heavy dash lines of Exhibit No. 56 (outlining the territory tributary to the Guyandot River line), east of Gilbert, amounts to 410,000,000 tons of low volatile coal and 470,000,000 tons of high volatile coal. Between Gilbert and Wharncliffe in the same area he estimates that there are 120,000,000 tons of high volatile coal.

(47) It was stipulated that the parties may refer to the printed reports of the Commission in Docket Nos. 13,832 and 14,454 and in Finance Docket No. 4943.

(48) Witness Eavenson (Tr. pp. 464 and following) testified that he has made an estimate of the number of tons of recoverable coal remaining in the ground in the territory tributary to the three roads, and filed Exhibit No. 82 showing that estimate. In making the estimate he used the Virginia, West Virginia and Kentucky Geological Survey Reports, and a large amount of information collected by him personally. His estimate in Exhibit 82 shows (assigning the joint mine territory one-half to the C. & O. and one-half to the Virginian): That there are tributary to the C. & O. 4,031.5 square miles of coal bearing land, con-

taining 13,336,946,500 net tons of coal under three feet [fol. 170] thick, 24,262,966,000 net tons over three feet thick, a total of 37,599,912,500 tons. There has been extracted 642,012,000 tons, leaving remaining tons of 23,620,954,000 over three feet thick and 36,957,900,500 total tons.

For the N. & W. the area is 2,738 square miles, the tons under three feet thick 16,540,160,000 and over three feet thick 13,378,805,000, a total of 29,918,965,000. There have been extracted 651,658,000 tons, leaving 12,727,147,000 over three feet thick and 29,267,307,000 total remaining tons.

For the Virginian the arear is 832.5 acres, the tons under three feet 3,276,331,500, over three feet thick 3,422,459,800, and total 6,698,790,500. There have been extracted 82,110,000, leaving 3,340,349,000 tons over three feet thick and 6,616,680,500 total tons remaining.

(49) Witness Walker, filed Exhibit No. 83 showing his estimate of tonnages available to three roads, as follows:

	30 to 36"	Over 36"	Total
C. & O.	2,750,800,000	23,019,700,000	26,770,500,000
N. & W.	2,406,500,000	12,789,700,000	13,196,200,000
Virginian	455,700,000	3,216,000,000	3,671,700,000

(50) Witness Traugott testified (Tr. p. 545) that "even if there were not local business on the Elmore Gilbert line, the necessity for its construction is apparent from an examination of the map and profiles of the Chesapeake & Ohio, Norfolk & Western Railway and the Virginian Railway leading from the coal fields in the Upper Guyandot Basin to the west and from the coal fields in the Lower Guyandot Basin to the east." Filed Exhibit comparing existing route via Matoaka, with proposed route via Gilbert and Wharncliffe, as follows:

"Profie No. 4 shows the grades and distances over which coal originating in the Upper Guyandot River Basin moves at present via the Virginian to Matoaka and thence by the Norfolk & Western Railway to the west. The objections to this route are the rise of 1125 feet on a 2.07 per cent ruling grade between Gulf Junction and Matoka, and the distance, which is 39.1 miles [fol. 171] longer than via the proposed Virginian & Western line.

"Profile No. 5 shows the grades and distances over which the same coal would move if hauled by the Virginian via the proposed line of the Virginian & Western and delivered to the proposed connecting line of the Norfolk & Western at Gilbert. Although the present line shown on profile No. 4 is electrified for 20.3 miles, there will be a saving on No. 5 in heavy grades, and a saving of 39.1 miles in distance. The grades on No. 5 are descending except the short grade of 1.04 per cent just west of Gilbert on the proposed connecting line of the Norfolk & Western Railway."

(51) Witness Hix testified (Tr. pp. 588-589) with regard to the movement of westbound coal from Virginian mines over existing compared with proposed routes, especially:

"It is evident that coal originating in the upper Guyandot Basin * * * can move to the west more economically and expeditiously via the proposed line than via Matoaka and the Norfolk & Western, whether it moves from Gilbert over the C. & O. or over the N. & W. by way of Wharncliffe and notwithstanding the Virginian electrification, because of the advantage in grades and distance."

(52) Witness Hix testified (Tr. pp. 591-592) as follows:

"* * * the diversion to the proposed line of the traffic now routed via Matoaka and the Norfolk & Western will not be important to the Norfolk & Western, particularly if this traffic or a portion of it comes to the Norfolk & Western again at Wharncliffe, and the diversion to the new line of westbound traffic, which would otherwise go via Matoaka, will not affect the Virginian, both because its place will largely be taken by new traffic originating on the proposed line and because the diversion of westbound traffic to the proposed line will to a certain extent postpone expenditures which will be necessary sooner or later for handling increased traffic between Elmore and Princeton. * * *"

(53) Witness Hix testified (Tr. pp. 592-593):

"The overhead traffic is likewise conservatively estimated. The Virginian Railway itself is now shipping in

excess of 3,000,000 tons of coal to the west and this traffic is increasing. Most of the westbound coal from present Virginian tracks could move over this line, and all of it could so move if a connection were established with the Norfolk & Western via Gilbert and Wharncliffe, and it would be so much to the advantage of the Chesapeake & Ohio Railway and its shippers to use this line for their westbound low volatile coal originating in the Guyandot Basin and for their eastbound high volatile coal originating in the Logan field that it seems inevitable that it would be so used."

[fol. 172] EXHIBIT "B"

RESPONSES OF THE CHESAPEAKE AND OHIO RAILWAY COMPANY TO REQUESTS EMBODIED IN MEMORANDUM SUBMITTED BY NORFOLK AND WESTERN RAILWAY COMPANY, AS TO ADDITIONAL EVIDENCE WHICH APPELLEES DESIRE INCLUDED IN THE RECORD—Filed January 18, 1930

The following responses refer to the several numbered requests, and are carried under corresponding numbers. The word "agreed" is to be taken as indicating not an acceptance or adoption of the precise language used, but an agreement to prepare and submit an accurate statement of the evidence or other matter covered by the request.

The right is reserved to add any matter which, on a recheck of the record, it may appear should be added.

(1)-(5) Agreed.

(6) The purposes of the proposed Chesapeake line have now become immaterial, and in addition to this the matter is adequately dealt with in the report of the Commission (145 I. C. C. 171-2, 186, etc.).

(7)-(8) This testimony and exhibit are superfluous and immaterial. They were introduced to sustain the application of the Chesapeake, the Commission's action as to which is not in issue here. A summary of the figures is included in the report of the Commission (145 I. C. C. at pages 472-173). Evidence as to shipments in 1925 and 1926 and the reasons why those years were not representa-

tive is additionally superfluous for the reason that the [fol. 173] Commission took the year 1927 as normal. The District Court found it unnecessary to use any of these figures and the inclusion of 10 pages of evidence and an exhibit containing 24 pages of figures on this point would be an unjustifiable imposition on the Supreme Court.

(9)-(10) This matter is superfluous and immaterial for similar reasons. Exhibit 27, containing 14 pages of figures, and the explanation of it, occupying nearly twenty pages of the transcript (pp. 173-192), were introduced to sustain in detail the claims of transportation savings of the Chesapeake in support of its application. The exhibit and testimony are adequately described and their effect stated in the report of the Commission (145 I. C. C. at pages 174-5).

(11)-(12) This matter is superfluous and immaterial for similar reasons, and for the additional reason that it was offered in support of a proposed co-operative method of handling the business which has become impossible as a result of the denial of the Chesapeake's application, and thus has no bearing on the present case. It is, moreover, set out in substance in the report of the Commission (145 I. C. C. at pages 178-9).

(13)-(15) Agreed, though (13) and (14) are sufficiently set forth in the report of the Commission (145 I. C. C. pp. 153-4).

(16) Immaterial for the same reasons as No. 6, and superfluous because substantially covered in the report of the Commission (145 I. C. C. 187).

(17)-(22) Immaterial and superfluous for similar rea- [fol. 174] sons to those stated in connection with Nos. (7) to (12), inclusive, and Nos. (19) and (22) are immaterial in themselves, in any view of the case.

(23)-(28). Agreed.

(29)-(31) This matter is superfluous because it is sufficiently set forth in the report of the Commission (145 I. C. C., principally at pages 175-6).

(32)-(35) Agreed.

(36) This is sufficiently abstracted in the proposed Statement of the Evidence, pages 12-13.

(37) Agreed.

(38) Immaterial, as it related to the proposed Norfolk and Western line from Wharncliffe to Itmann. See 145 I. C. C. at page 187.

(39)-(41) Agreed.

(42)-(45) Agreed, so far as not already included in the Statement of Evidence at pages 15-17.

(46—first paragraph so numbered—47, including two paragraphs apparently duplicating the numbers 45 and 46) Agreed.

(48)-(53) Agreed.

It may be necessary to include other portions of Mr. Hix's testimony so as to give an adequate conception of the matter included.

[fol. 175] IN UNITED STATES DISTRICT COURT

No. 2379

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Petitioner,

vs.

UNITED STATES OF AMERICA, GUYANDOT AND TUG RIVER Railroad Company, and Norfolk and Western Railway Company, Defendants, and Interstate Commerce Commission, Intervening Defendant

Statement of Evidence—Filed March 6, 1930

This cause came on for trial before the above-entitled Court, Honorable Elliott Northcott, Circuit Judge, presiding, and Honorable William E. Baker and Honorable George W. McClintic, District Judges, assisting, on the 3rd day of January, A. D. 1929.

Messrs. Robt. B. Tunstall, Douglas W. Brown, Geo. H. Gardner, and Thomas L. Preston appeared for the Petitioner.

Messrs. Theodore W. Reath, John H. Holt, D. Lynch Younger, and Robert E. McCabe appeared for the defendant railways.

Mr. James Damron appeared for the United States and Mr. Nelson Thomas for the Intervening Defendant, Interstate Commerce Commission.

Thereupon, evidence was taken and objections thereto and rulings thereon made as hereinafter set forth.

The Petitioner offered in evidence a copy of the record in the proceedings before the Commission in Finance Dockets Nos. 4818, Proposed Construction of Lines by The Chesapeake and Ohio Railway Company; 5161, Construction of Line by Guyandot and Tug River Railroad Company; and 6067, Construction of Line by Virginian and Western Railway Company; which said record was duly certified by twenty-five certificates of the Clerk of [fol. 176] the Commission, and which record and certificates were thereupon admitted in evidence and marked Plaintiff's Exhibits Nos. 1 to 25, inclusive, which said Exhibits, condensed as hereinafter set forth, are in the following form:

PLAINTIFF'S EXHIBITS NOS. 1 TO 25, INCLUSIVE

Condensed Statement of Record Before the Interstate Commerce Commission in Finance Dockets Nos. 4818, 5161, and 6067

PREFATORY NOTE

A brief preliminary statement concerning the record in the above-entitled proceedings will at once clarify the case presented and explain the basis upon which the evidence has been condensed.

The three Finance Dockets mentioned in the foregoing caption all dealt with applications for certificates of present and future public convenience and necessity filed under Paragraphs (18)-(20) of Section 1 of the Interstate Commerce Act. Finance Docket 4818 dealt with the application of the Petitioner in the District Court, The Chesapeake and Ohio Railway Company, hereinafter sometimes called "Chesapeake"; Finance Docket 5161 dealt with the application of the Guyandot and Tug River Railroad Company, a subsidiary of the Norfolk and Western Railway Com-

pany, hereinafter generally included with that company under the designation "Norfolk", but sometimes referred to as the "Guyandot"; and Finance Docket 6067 dealt with the application of the Virginian and Western Railway Company, a subsidiary of the Virginian Railway Company, hereinafter generally included with that company under the designation "Virginian", but sometimes referred to as the "Virginian and Western".

[fol. 177] These applications were heard in the order in which they were filed, which is that in which they are stated in the preceding paragraph, and were decided by Division 4 of the Commission by one order entered July 23, 1928, subsequent proceedings of the Commission therein being set forth in detail in Paragraph VIII of the Petition, which is admitted by the answers. The record of the proceedings before the Commission included the applications, returns to the questionnaires emitted by the Commission, a transcript of the testimony containing 710 pages, 119 exhibits, and the report and orders of the Commission. This entire record was introduced before the District Court. Appellant did not question before the District Court and does not now question, any statement of fact (as distinguished from conclusions based on those facts) found in the report of the Commission.

On December 23, 1929, appellant duly filed in the Clerk's office of the District Court a condensed statement of the evidence which it submitted as a complete statement of all the evidence material and necessary to be considered upon this appeal. From this statement, in addition to sundry portions of the record omitted as immaterial, appellant omitted as superfluous all evidence which in its judgment merely supported facts admitted by the pleadings and/or set forth in the report of the majority of the Commission or in the separate expression of Commissioner Porter, which majority report and separate expression are hereinafter collectively referred to as the "report".

On January 3, 1930, appellees appeared before the court in opposition to the statement so filed by appellant, and moved that appellant be required to state in condensed form the entire transcript of the evidence and exhibits herein.

The court overruled the said motion and directed appellees to submit to the court a memorandum pointing out

the specific evidence and specific exhibits which appellees deemed necessary to complete the statement of the evidence filed by appellant, avoiding duplication of matter set forth in appellant's statement, of matter admitted in [fol. 178] the pleadings, and of matter set forth in said report, to which order the appellees excepted.

Pursuant to said direction, appellees filed a memorandum setting forth their requests for the inclusion of specific evidence and exhibits, and appellant filed its responses to the said requests.

After full argument, the court, by order of January 18, 1930, directed apellant to include in condensed form certain specified portions of the evidence and exhibits requested by appellees, with certain specified exceptions; to which order the appellants excepted.

By the said order, there were filed with the papers in this cause as Exhibits A and B_4 respectively, the aforesaid memorandum filed by appellees and the response thereto filed by appellant. The subjoined statement of the evidence is made in conformity with said order of January 18, 1930, to which and to said Exhibits A and B filed thereby, which appear ante, pp. — reference is hereby made

Condensed Statement of the Evidence and Exhibits Before the Commission in Finance Dockets Nos. 4818, 5461 and 6067 Not Adequately Stated in the Report or Admitted in the Pleadings.

Preliminary Matter

The hearing came on pursuant to notice on November 3, 1927, before Examiner H. C. Davis. Appearances were noted for the Chesapeake; for the Norfolk and its subsidiary, the Guyandot; for the Virginian and Western and its parent company, the Virginian; for the Chamber of Commerce of Princeton, W. Va.; for the City of Princeton, W. Va.; and for the County Court of Wyoming County, W. Va. The Examiner announced that the applications would be heard in the order in which they were filed—first, the Chesapeake, then the Guyandot, and then the Virginian and [fol. 179] Western—and that the interveners should follow with their witnesses. The Examiner made the following suggestion:

"I think to keep this record clear, it ought to be stipulated that all of the testimony and the transcripts will be available for the use of all parties; also for use of the Commission. That is, that all parties can refer to any testimony or statements in the transcripts as long as they relate to the one general subject."

All parties assented to this suggestion, and the Examiner thereupon stated:

"The record will show that it is stipulated by all parties that all evidence taken in the transcript shall be equally available to all parties and may be considered by the Commission in disposing of each and all of the applications."

The Examiner stated that the several applications and the several returns filed by the parties to the questionnaires of the Commission should have the effect of pleadings. It was agreed that due publication of the notices of the application had been made. Each applicant presented its evidence in support of its application and in opposition to the applications of the other parties as a unit.

W. C. HUEL was called as a witness on behalf of the Chesapeake, and, being duly sworn, testified as follows:

My official position with the Chesapeake is Assistant to the Vice-President in Charge of Traffic.

I am familiar, in a general way, with the traffic conditions of the so-called Pocahontas carriers, particularly the Chesapeake, the Virginian, and the Norfolk, and of the territory served by those carriers.

Rates on coal are in effect via the Virginian-Deepwater-Chesapeake route to the Lakes and points in Central Freight Association territory from mines in the Winding Gulf fields but not from mines in the Stone Coal fields.

In Interstate Commerce Commission Dockets 13832 and 14454, decided together on March 10th, 1925, the Virginian was ordered to establish rates via Pemberton or Deepwater and the Chesapeake on coal westbound from mines [fol. 180] that they served. The Virginian then petitioned the Commission to reopen the cases for reargument before the whole Commission. The Commission declined to do

this or to give further time for the publication of the rates.

The Virginian then asked the Commission for postponement of the effective date of the order for sixty days because they were going to file in the United States District Court for the Southern District of West Virginia a bill asking for an injunction against the Commission's orders.

The Commission granted this request and suit was brought in the United States District Court, which court denied the injunction but ordered that the Commission be temporarily restrained from making effective its order pending an appeal by the Virginian to the Supreme Court of the United States. That court denied the injunction, the effect of which was to sustain the order of the Commission requiring the Virginian to publish joint westbound rates on coal on the New River District basis via the Chesapeake. This was in December, 1926.

On December 27th, 1926, the Virginian again petitioned the Commission to reopen these cases for taking additional testimony on the grounds that the route via Matoaka and the Norfolk, rates via which route had been established, satisfied the purpose of the original order of the Commission and that to establish a route via Deepwater and the Chesapeake would involve tremendous capital outlay to make effective interchange with the Chesapeake.

The response to this was a further order from the Commission to the Virginian to establish the rates via Deepwater and the Chesapeake effective January 25th, 1927, which was done.

In publishing its rates the Virginian covered only the destination territory that was involved at the time the original complaints were filed and has refused to establish via Deepwater and the Chesapeake the New River District basis of rates on coal from their mines to Western and Northwestern territories. These through rates had [fol. 181] been established from the Virginian via Matoaka, W. Va., and the Norfolk subsequent to the original complaints to the Commission referred to, and are now in effect. The Virginian and the Chesapeake both serve the Winding Gulf territory with their own rails.

The Virginian publishes rates from mines on its Winding Gulf Branch via Deepwater and the Chesapeake to comply with Section 4 of the Act to Regulate Commerce, but from

their Stone Coal Branch, which is served only by the rails of the Virginian, and to which the Chesapeake has access through Virginian service, the Virginian does not publish rates via Deepwater and the Chesapeake.

The effect of this rate adjustment is that it forces the coal shippers on the Virginian to send the greater part of their coal west by way of Matoaka and the Norfolk, as in so moving the coal can be reconsigned en route under through rates to points west of Chicago and the Mississippi River, whereas if the same coal moved by way of the Chesapeake it would have to be eventually sold at some point to which a through rate applied via the Deepwater gateway.

The privilege of being able to consign coal to Chicago, for illustration, and of being able to reconsign to a point west at a through rate is of very great benefit and advantage to the coal man in Chicago, and hence he must confine the routing of coal via Deepwater and the Chesapeake to that which he has actually sold and on which final shipping instructions are given the mine at time of shipment.

In approaching the question as to what effect, if any, construction of the extensions proposed in these proceedings would have upon the existing competitive status of the Chesapeake, the Norfolk, and the Virginian, I may point out that the word "competition" is very loosely used. It sometimes relates to competition in the marketing of the same commodity in common markets. The three carriers mentioned all originate traffic in the same general [fol. 182] territory, producing the same commodities, and, either by their own lines or by traffic arrangements with other carriers, transport these commodities to many common markets.

Thus, with particular reference to coal, which constitutes the predominant tonnage of each of these carriers, all of them, in the eastbound movement, reach substantially the same destination at Hampton Roads. In the westbound movement the Chesapeake and the Norfolk reach many common destination points, and the Virginian, by existing traffic arrangements, routes its coal to many if not most of the same points.

Similar conditions exist, to a lesser degree, as to other commodities, such as lumber, originating in the West Virginia territory.

In the marketing of these commodities active competition exists at all times, and since it is both the duty and self-interest of the carriers to further in every proper way the legitimate interests of their shippers, this competition may be said to extend to the carriers themselves, and as to certain commodities is very acute.

Its effect is undoubtedly to promote good service. I cannot see that this kind of competition would be lessened by the construction of the proposed extensions.

Another form of competition is the competition between routes, which constitutes a somewhat more direct competition of service than that last described. This would, if through routes and joint rates were available to all the originated traffic to common markets, depend entirely upon the question whether more rapid and efficient service might be brought about by one carrier than by another to common markets to which through routes and joint rates exist; which rates are of necessity identical.

The importance of this form of competition may well be exaggerated. Thus, the great majority of the coal mines served by the Chesapeake and the Norfolk have but one [fol. 183] carrier serving them, and this fact has not resulted in impairing the service they receive; for, as I have stated, an incentive to render good service arises out of the marketing competition between the commodities produced. This form of competition, however, does exist among the carriers under consideration, being the competition of the routes affecting the movement of coal originating at mines served by the Virginian in the New River field, the routes being the Chesapeake's own line to the west (this applying only to mines jointly served), the route via Deepwater and the Chesapeake, and the route via Matoaka and the Norfolk.

This competition is not as free as it otherwise would be by reason of the rate situation to which I have previously referred, which places the Chesapeake's route via Deepwater at a material disadvantage as compared with the Norfolk's route via Matoaka.

The construction of the proposed extension by the Chesapeake would provide a route for coal originating at the mines served by it and the Virginian in the New River field as against the route via Matoaka and the Norfolk. Inasmuch as coal already moves in very large quantities via

this latter route it seems to me that the provision of a line offering shorter distances and more favorable grade would of necessity further the public interest by providing more effective competition of this character.

It might perhaps be supposed that the construction of the line proposed by the Norfolk from Gilbert to Wharncliffe would further the competition of routes and service by providing a new route to the west. It should be borne in mind, however, that the route via Matoaka already exists, and will continue.

It follows that the question is not whether the establishment of a new route to the west is so valuable as to justify the burdening of the national transportation system with the cost of this proposed line, but whether any superiority of the proposed Gilbert-Wharncliffe route over the existing Matoaka route would justify that cost.

[fol. 184] Stated a little differently, the question is whether it is justifiable from the standpoint of public benefit to make the expenditure for the Gilbert-Wharncliffe line in order to provide three routes to the west instead of the two which would be available if the Chesapeake were to build the proposed line. In the second place, the Gilbert-Wharncliffe route involves a haul over heavy grades, which would be avoided by following the natural route in the Guyandotte Valley.

In view of these circumstances, and having in mind also the fact that, as I have said, the value of alternative routes my readily be exaggerated, I cannot feel that a proposal to spend $3,500,000 to provide through the Norfolk a third western outlet should be seriously considered.

I have had prepared an exhibit showing westbound routes available from each mine in that part of the New River district of West Virginia, south of the main line of the Chesapeake, whether served by the Chesapeake and the Virginian, or by either of those companies jointly with others, which I have personally checked and know to be correct.

Thereupon there was offered and admitted in evidence the exhibit referred to, marked Exhibit No. 24.

(Here follows Exhibit 24, marked side folio pp. 185-187)

[fol. 185]

EXHIBIT 24, WITNESS HULL

Before the Interstate Commerce Commission

Finance Docket #4818

New River Coal District of West Virginia

Statement Showing Westbound Routes Available from Each Mine in That Part of the New River District South of the Main Line of the Chesapeake and Ohio Railway Company

Station number	Name of mine	Joint or local	Rates apply via			
			C. & O. direct via Prince	C. & O. direct via Thurmond	Vgn. R'y Matoaka and N. & W.	Vgn. R'y Deepwater and C. & O.
1	Ingram Branch	Virginian	No	No	Yes	Yes
	Lick Fork (Hysteam)	Virginian	No	No	Yes	Yes
	Glencoe	Virginian	No	No	Yes	Yes
2	Oakwood	Joint	No	Yes	Yes	No
	Summerlee	Joint	No	Yes	Yes	No
	Lochgelly	Joint	No	Yes	Yes	No
3	Veazy	C & O	No	Yes	No	No
	Scarbro	Joint	No	Yes	No	No
	Whipple	Joint	No	Yes	No	No
	Nichol	Joint	No	Yes	No	No
4	Price Hill	Joint	No	Yes	No	No
	North Kilsyth	Joint	No	Yes	No	No
5	Derryhale	Joint with K G J & E R'y	No	Yes	No	No
	Balwood	Joint with K G J & E R'y	No	Yes	No	No
	Lee	Joint with K G J & E R'y	No	Yes	No	No

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EXHIBIT 24, WITNESS HULL—Continued

Station number	Name of mine	Joint or local	Rates apply via C. & O. direct via Prince	C. & O. direct via Thurmond	Vgn. R'y Matoaka and N. & W.	Vgn. R'y Deepwater and C. & O.
	Kilsyth	Joint with K G J & E R'y	No	Yes	No	No
	Fayral	Joint with K G J & E R'y	No	Yes	No	No
	Cepece	Joint with K G J & E R'y	No	Yes	No	No
	Oswald	Joint with K G J & E R'y	No	Yes	No	No
	Tamroy	Joint with K G J & E R'y	No	Yes	No	No
	Siltix	Joint with K G J & E R'y	No	Yes	No	No
	Packs Branch	Virginian	No	Yes	No	No
6	Dun Glen	C & O	No	Yes	No	No
	Cadle Ridge	C & O	No	Yes	No	No
	Meadow Fork	C & O	No	Yes	No	No
	Prudence	C & O	No	Yes	No	No
	Harvey	C & O	No	Yes	No	No
	Star	C & O	No	Yes	No	No
	Collins	C & O	No	Yes	No	No
	Sun	Joint with K G J & E R'y	No	Yes	No	No
	Dunloop	Joint with K G J & E R'y	No	Yes	No	No
	Sugar Creek	Joint with K G J & E R'y	No	Yes	No	No
	Turkey Knob	C & O	No	Yes	No	No
	McDonald	C & O	No	Yes	No	No
	Mt. Hope	C & O	No	Yes	No	No
[fol. 186]						
7	Royal	Virginian	Yes	No	No	No
	Terry No. 1	C & O	Yes	No	No	No
	Terry No. 2	C & O	Yes	No	No	No
	Piney No. 1	C & O	Yes	No	No	No

	Black Knight No. 7 (Raleigh No. 7)	C & O	Yes	No	No	No
	Black Knight No. 3 (Raleigh No. 3)	Joint	Yes	No	Yes	No
	Piney No. 3	C & O	Yes	No	No	No
	Black Knight No. 1 (Raleigh No. 1)	Joint	Yes	No	Yes	No
	Mabscott	Joint	Yes	No	Yes	No
	Lanark	C & O	Yes	No	No	No
	Wright No. 1	C & O	Yes	No	No	No
	Wright No. 2	C & O	Yes	No	No	No
	Black Knight No. 5 (City Coal No. 2)	Joint	Yes	No	Yes	No
8	Blue Jay No. 5	C & O	Yes	No	No	No
	Blue Jay No. 6	C & O	Yes	No	No	No
9	Eccles No. 5	Joint	Yes	No	Yes	Yes
	Eccles No. 6	Joint	Yes	No	Yes	Yes
	Summit	Joint	Yes	No	Yes	Yes
	Glen White	Joint	Yes	No	Yes	No
10	Long Branch	Virginian	No	No	Yes	Yes
	Willis Branch	Virginian	No	No	Yes	Yes
11	Black Knight No. 6 (Raleigh No. 6)	Joint	Yes	No	Yes	No
	Crab Orchard	Joint	Yes	No	Yes	No
	Lillybrook No. 4	Joint	Yes	No	Yes	Yes
	Woodpeck	C & O	Yes	No	No	No
12	Cranberry No. 1	Joint	Yes	No	Yes	No
	Cranberry No. 2	Joint	Yes	No	Yes	No
	Cranberry No. 3	Joint	Yes	No	Yes	No
	Piney No. 6	Joint	Yes	No	Yes	No
13	Bacontown	Virginian	No	No	Yes	Yes
	Ralco	Virginian	No	No	Yes	Yes
	Douglas	Virginian	No	No	Yes	Yes
	Leckie	Virginian	No	No	Yes	Yes
	Lillybrook No. 2	Virginian	No	No	Yes	Yes
	Willabet	Virginian	No	No	Yes	Yes
	Phillips	Virginian	No	No	Yes	Yes
	Sterling	Virginian	No	No	Yes	Yes
14	Pemberton	Joint	Yes	No	Yes	Yes
	Affinity	Joint	Yes	No	Yes	Yes

Exhibit 24, Witness Hull—Continued

Station number	Name of mine	Joint or local	Rates apply via: C. & O. direct via Prince	C. & O. direct via Thurmond	Vgn. R'y Matoaka and N. & W.	Vgn. R'y Deepwater and C. & O.
	Winding Gulf No. 2	C & O	Yes	No	No	No
	Big Stick	Virginian	No	No	Yes	Yes
	Hot Coal	Virginian	No	No	Yes	Yes
	Woodbay	Virginian	No	No	Yes	Yes
	Winding Gulf No. 1	Virginian	No	No	Yes	Yes
	MacAlpin	Joint	Yes	No	Yes	Yes
	Stotesbury	Joint	Yes	No	Yes	Yes
	Tams	Joint	Yes	No	Yes	Yes
	Diehl	C & O	Yes	No	No	No
	Helen No. 3 and No. 4 (East Gulf No. 3 and No. 4)	Joint	Yes	No	Yes	Yes
	Helen No. 5 (East Gulf No. 5)	Virginian	No	No	Yes	Yes
	Mistletoe (Winding Gulf No. 4)	Virginian	No	No	Yes	Yes
15	Tommy Creek	Joint	Yes	No	Yes	No
	Rhodell	Joint	Yes	No	Yes	No
	Minter	Joint	Yes	No	Yes	No
	C. H. Mead No. 1	Joint	Yes	No	Yes	No
	Killarney	Joint	Yes	No	Yes	No
	Vanwood	Joint	Yes	No	Yes	No
	Besoco (Beckley Smokeless)	Joint	Yes	No	Yes	No
	Lego	Joint	Yes	No	Yes	No
[fol. 187]						
15	Pickshin	Joint	Yes	No	Yes	No
	Lillybrook No. 3	Joint	Yes	No	Yes	No
	Princewick	Joint	Yes	No	Yes	No
	C. H. Mead No. 2	Joint	Yes	No	Yes	No

	Lillybrook No. 1	Joint	Yes	No	Yes	No
	Kilpoca (Killarney No. 2)	Joint	Yes	No	Yes	No
16	J. A. Wood	Virginian	No	No	Yes	Yes
	Wacomah	Virginian	No	No	Yes	Yes
	Amigo	Joint	Yes	No	Yes	Yes
	Devils Fork	Virginian	No	No	Yes	Yes
	Iroquois	Virginian	No	No	Yes	Yes
	Wyoming (Wyco)	Virginian	No	No	Yes	Yes
	Miler Poca No. 1	Virginian	No	No	Yes	Yes
	Miler Poca No. 2	Virginian	No	No	Yes	Yes
	Madeleine	Virginian	No	No	Yes	Yes
17	Glen Rogers	Virginian	No	No	Yes	Yes
	Otsego	Virginian	No	No	Yes	Yes
	Caloric (Poca Pack)	Virginian	No	No	Yes	Yes
	Nuriva	Virginian	No	No	Yes	Yes
	Morrison	Virginian	No	No	Yes	Yes
	Faith	Virginian	No	No	Yes	Yes
	Slab Fork No. 1	Virginian	No	No	Yes	Yes
18	Mead. Poca	Virginian	No	No	Yes	Yes
	Itmann	Virginian	No	No	Yes	Yes
	Alpoca	Virginian	No	No	Yes	Yes
	Thermo Poca	Virginian	No	No	Yes	Yes
	Monticello	Virginian	No	No	Yes	Yes
	Flat Top	Virginian	No	No	Yes	Yes
	Covel	Virginian	No	No	Yes	Yes
	Garwood	Virginian	No	No	Yes	Yes
	Micajah Poca	Virginian	No	No	Yes	Yes
	Algonquin	Virginian	No	No	Yes	Yes

Cross-examination:

(The testimony following is transcribed in the exact words of the witness, as its exact import might otherwise not be clear.)

"Q. Now you have referred to the fact that by reason of not being able to reconsign shipments at Chicago to the Northwestern territory you considered the Chesapeake & Ohio at a disadvantage. Isn't it a fact that your road, the Chesapeake & Ohio Railway, refused to concur in any rates to the west by way of the Chesapeake & Ohio from joint mines?

A. From joint mines but not from coal mines.

[fol. 188] Q. Well, I asked as to joint mines. Isn't it a fact too that the joint mines can now ship via the Chesapeake & Ohio and reach that territory if they need to?

A. The joint mines can, yes, sir."

R. S. Marshall was called as a witness on behalf of the Chesapeake, and, being duly sworn, testified as follows:

I am Assistant to the President of the Chesapeake and the Hocking Valley Railway Company. My routine duties are principally in connection with the preparation and revision from time to time of the operation and maintenance budgets and the budgets covering expenditures for Additions and Betterments. My principal duties, however, during the past three years, have been in connection with the acquisition and construction of other lines of railroad by the Chesapeake and special duties incident to cases before the Interstate Commerce Commission in which the Chesapeake and Hocking Valley have been interested.

The first purpose of the proposed extensions is to provide an economical outlet for westbound coal produced in the Winding Gulf section and moving to markets north of the Ohio River. Before undertaking to state the amount of coal produced therein which will be available for movement to the west via the proposed extensions and the Logan

Subdivision of the Chesapeake, I should say that in referring to the Winding Gulf section I have in mind all of the territory drained by the Guyandot River east of Mullens, and its tributaries including Slab Fork, Winding Gulf Creek, Tommy Creek, Stone Coal Creek, Devils Fork, Cooney Otter Creek and Barkers Creek.

The section would include all of the Virginian and its branch lines, including the Virginian & Western, west of Clarks Gap and south of Jennp Gap and Pemberton and would include all of the Chesapeake's Winding Gulf Branch [fol. 189] south of Pemberton. The Piney Creek Branch of the Virginian is actually on the headwaters of Piney Creek, which is a tributary of New River but the Valley of Piney Creek at that point is at such a high altitude that coal produced on this branch can reach the head of Winding Gulf Creek through Pemberton without very much up grade haul.

Based upon figures for the first nine months of 1927, I estimate that this territory will produce coal for westbound movement in that year amounting to 4,444,464 tons.

In January, 1927, joint through rates were established from Virginian local mines to the west via Deepwater and the Chesapeake, limited to a certain destination territory less extensive than that covered by the rates applicable via the Matoaka gateway. The westbound tonnage moving via the Deepwater route increased from 1,277 tons in January, 1927, to 81,843 tons in May, 1927, and aggregated a total of 462,462 tons during the first nine months of 1927, from both local and joint mines, of which 430,424 tons originated in the Winding Gulf District, largely at Virginian local mines.

As I have said the natural route for westbound coal from this section is down the Guyandot River to a connection with the Logan Division at Gilbert but in the absence of railorad facilities between Mullens and Gilbert the movement of this coal to the west has followed the artificial routes via Deepwater and Matoaka provided by the existing lines of railroad and as between these is influenced by the artificial tariff routes occasioned by the existing tariffs.

The existing lines of railway, originally constructed primarily for the movement of eastbound coal, climb out of this natural basin and pass over the boundary line which I have described at Jenny Gap, Pemberton and Clarks Gap with grades against the loaded movement of from 1.75 per cent to 2.07 per cent.

The artificial routes as provided by the existing tariffs have also brought about a movement of westbound coal from mines outside the Winding Gulf District including [fol. 190] those in the Piney Creek basin north of Pemberton, mines situated on the headwaters of Marsh Fork between Jenny Gap and Harper and even from mines in the Loup Creek basin and on the headwaters of Paint Creek, this coal moving over from one to three divides and through the Winding Gulf basin to the Norfolk at Matoaka. 915,117 tons of coal moved from the New River water shed through the Winding Gulf basin to the Norfolk at Matoaka during the first nine months of 1927. The natural route for all of this tonnage was by way of Prince and Thurmond. Notwithstanding this circumstance we must, in considering the proposed construction, assume that the coal will follow the natural channel, because the railroads with such natural advantages will be in position to provide such service as will attract the business to those routes. Therefore in considering the amount of coal tonnage available to the propesed new route down the Guyandot River, I have taken only that tonnage which is naturally tributary to that route, that is to say, the tonnage originating in the Winding Gulf District.

For convenient presentation I have divided into 18 sections the operating mines in that part of the New River coal district south of the Chesapeake's main line. The sectional arrangement is as follows:

Section No. 1 is that part of the Virginian north of Silver Gap which is directly tributary to New River.

Sections Nos. 2, 3, 4, 5 and 6 cover all of the mines in the Loup Creek Basin tributary to Thurmond on the Chesapeake's main line but these mines are separated into five groups, as follows:

Section 2, the White Oak Branch of the Virginian.

Section 3, the White Oak Branch of the Chesapeake.

Section 4, the Price Hill Branch of the Chesapeake.

Section 5, the mines served solely by the Kanawha, Glen Jean & Eastern Railway.

Section 6, the mines on the Loup Creek Branch of the Chesapeake including those which are served jointly by the Chesapeake and the Kanawha, Glen Jean & Eastern.

[fol. 191] Sections Nos. 7, 8, 11 and 12 are in the Piney Creek Basin tributary to Prince on the Chesapeake's main line but are separated into four groups as follows:

Section 7, the Piney Branch from Prince to Westwood.

Section 8, the mines on the Glade Creek & Raleigh Railway.

Section 11, the Raleigh & Southwestern Branch which extends from Raleigh southward to the divide at Pemberton.

Section 12, the Piney River and Paint Creek Branch extending northward from Raleigh.

Section No. 9 covers the mines that are located on the headwaters of Marsh Fork of Coal River.

Section No. 10 covers the two mines on the Virginian's main line between Harper and Silver Gap.

Sections Nos. 14 to 18, inclusive, are all in the Winding Gulf District, as I have described that district, and Section No. 13 on upper Piney Creek is considered, for the reasons heretofore given, as a part of the Winding Gulf District. These mines are separated into six groups, as follows:

Section 13, the Virginian, Piney Branch.

Section 14, Winding Gulf branches of both the Chesapeake and the Virginian.

Section 15, the Stone Coal Branch where all of the mines are joint.

Section 16, the Virginian between Stone Coal and Mullens.

Section 17, the Virginian on Slab Fork and the Virginian & Western.

Section 18, the Virginian between Elmore and Clarks Gap including the Elmore Branch to Itmann.

In giving consideration to the amount of coal available for movement to the west via the proposed extensions and

the Logan Subdivisions, I have prepared an exhibit, consisting of 11 pages, entitled "Coal Tonnage".

Thereupon there was offered and admitted in evidence, Exhibits No. 26, which is in the following form:

[fol. 192] (Here follows Exhibit No. 26, marked side folio pp. 193-203, from which all figures save those relating to 1927 have been omitted in accordance with the Court's order of January 18, 1930.)

[fol. 193]

EXHIBIT No. 26, WITNESS MARSHALL

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 4818

Coal Tonnage

Summary of Car Loads of Westbound Coal loaded at Local and Joint Mines by the Chesapeake and Ohio Railway and Virginian Railway (estimated for Calendar Year 1927), available for diversion to New Routes which will be created by the construction of proposed new line Gilbert to Mullens and Stone Coal Junction to Mullens, showing the Sections in which such Coal originates, the Routes via which it moved in 1827 and the Routes via which it can be moved after construction of such new lines.

Chesapeake and Ohio Traffic

Section number	Present route via Raleigh and Quinnimont Number of cars	Proposed route via Mullens and Gilbert Number of cars
14	16,794	16,794
15	10,191	10,191
Total	26,985	26,985

Virginian Railway Traffic

Section number	Present routes		Proposed route
	Via Deepwater and C. & O. Ry Number of cars	Via Matoaka and Norfolk and Western Number of cars	Via Elmore and Gilbert Number of cars
13	187	1,244	1,431
14	5,093	13,438	18,531
15	1	11,646	11,647
16	398	4,401	4,799
17	4,977	12,052	17,029
18	132	2,989	3,121
Total	10,788	45,770	56,558

[fol. 194]

New River District of West Virginia

(Sections Nos. 1 to 18, Inclusive)

Estimated Number of Cars of Westbound Coal Loaded at Local and Joint Mines by the Chesapeake and Ohio Railway and Virginian Railway, Calendar Year 1927, and Estimated Distribution by Routes, Assuming a Parity of Rates from All Mines, and Movement via Natural and Economical Routes After Construction of Proposed New Lines, Gilbert to Mullens and Stone Coal Junction to Mullens

Section No.		Estimated Total Number of cars year 1927	Chesapeake and Ohio Railway				Virginian Railway		
			Via Thurmond	Via Prince	Via Stone Coal Jct. and Gilbert	Total	Via deepwater	Via Elmore and Gilbert	Total
1	Deepwater, Oak Hill Junction, Virginian R'y	158	.....	.....	.....	.....	158	.....	158
2	White Oak Branch, Virginian R'y	3,734	1,251	.....	.....	1,251	2,483	.....	2,483
3	White Oak Branch of C. & O. R'y	2,829	2,829	.....	.....	2,829	.....	.....	.....
4	Price Hill Branch of C. & O. R'y	2,222	2,222	.....	.....	2,222	.....	.....	.....
5	Kanawha, Glen Jean and Eastern R'y	7,153	7,152	.....	.....	7,152	1	.....	1
6	Loup Creek Branch of C. & O. R'y	11,815	11,815	.....	.....	11,815	.....	.....	.....
7	Piney Branch of C. & O. R'y, Prince to Westwood	14,722	.....	14,722	.....	14,722	.....	.....	.....
8	Glade Creek and Raleigh R'y	967	.....	967	.....	967	.....	.....	.....
9	Piney Branch of C. & O. R'y South of Westwood and Virginian R'y, Main Line, Jenny Gap to Harper	10,001	.....	.....	.....	.....	10,001	.....	10,001
10	Virginian R'y, Main Line on Paint Creek, Harper to Silver Gap	1,170	.....	.....	.....	.....	1,170	.....	1,170
11	Raleigh and Southwestern Branch of C. & O. R'y on Piney Creek	6,643	.....	6,643	.....	6,643	.....	.....	.....
12	Piney River and Paint Creek Branch of C. & O. R'y	14,370	.....	14,370	.....	14,370	.....	.....	.....
13	Virginian R'y, Branch on Piney Creek South of Pemberton	1,431	.....	.....	.....	.....	.....	1,431	1,431

14	Winding Gulf Branches of C. & O. and Virginian R'ys	35,325	.....	.....	16,794	16,794	.....	18,531	18,531
15	Stone Coal Branch of Virginian R'y	21,838	.....	.....	10,191	10,191	.....	11,647	11,647
16	Virginian R'y, Stone Coal and Mullens	4,799	.....	.....	.....	.....	.....	4,799	4,799
17	Virginian R'y on Slab Fork and Virginian and Western	17,029	.....	.....	.....	.....	.....	17,029	17,029
18	Virginian R'y, Main Line, Elmore to Clark's Gap and Elmore Branch.	3,121	.....	.....	.....	.....	.....	3,121	3,121
	Total, Sections Nos. 1 to 12, inclusive	75,784	25,269	36,702	.....	61,971	13,813	.....	13,813
	Total, Sections Nos. 13 to 18, inclusive	83,543	.....	.....	26,985	26,985	.....	56,558	56,558
	Grand Total	159,327	25,269	36,702	26,985	88,956	13,813	56,558	70,371

(Sections Nos. 1 to 18, Inclusive)

Tonnage of Westbound Coal Loaded at Local and Joint Mines by the Chesapeake and Ohio Railway and Virginian Railway, January to September, 1927, Inclusive, and Estimated Distribution by Routes, Assuming a Parity of Rates, from all Mines and Movement via Natural and Economical Routes After Construction of Proposed New Lines, Gilbert to Mullens and Stone Coal Junction to Mullens

Section No.	Name of section	Total westbound tonnage, Jan. to Sept., 1927, inclusive	Chesapeake and Ohio Railway				Virginian Railway		
			Via Thurmond	Via Prince	Via Stone Coal Jct. and Gilbert	Total	Via deepwater	Via Elmore and Gilbert	Total
1	Deepwater, Oak Hill Junction, Virginian R'y	6,290	.....	.....	.....	.....	6,290	.....	6,290
2	White Oak Branch Virginian R'y	148,997	49,920	.....	.....	49,920	99,077	.....	99,077
3	White Oak Branch of C. & O. R'y	112,870	112,870	.....	.....	112,870	.....	.....	.....
4	Price Hill Branch of C. & O. R'y	88,660	88,660	.....	.....	88,660	.....	.....	.....
5	Kanawha, Glen Jean and Eastern R'y	285,395	285,340	.....	.....	285,340	55	.....	55
6	Loup Creek Branch of C. & O. R'y	471,420	471,420	.....	.....	471,420	.....	.....	.....
7	Piney Branch of C. & O. R'y, Prince to Westwood	587,409	.....	587,409	.....	587,409	.....	.....	.....
8	Glade Creek and Raleigh R'y	38,600	.....	38,600	.....	38,600	.....	.....	.....
9	Piney Branch of C. & O. R'y, South of Westwood and Virginian R'y, Main Line, Jenny Gap to Harper	399,073	.....	.....	.....	.....	399,073	.....	399,073
10	Virginian R'y, Main Line on Paint Creek, Harper to Silver Gap	46,670	.....	.....	.....	.....	46,670	.....	46,670
11	Raleigh and Southwestern Branch of C. & O. R'y on Piney Creek	265,044	.....	265,044	.....	265,044	.....	.....	.....
12	Piney River and Paint Creek Branch of C. & O. R'y	573,377	.....	573,377	.....	573,377	.....	.....	.....
13	Virginian R'y, Branch on Piney Creek South of Pemberton	57,082	.....	.....	.....	.....	.....	57,082	57,082

14	Winding Gulf Branches of C. & O. and Virginian R'ys.....	1,409,454	.....	.....	670,080	670,080	.....	739,374	739,374
15	Stone Coal Branch of Virginian R'y	871,328	.....	.....	406,630	406,630	.....	464,698	464,698
16	Virginian R'y, Stone Coal and Mullens	191,491	.....	.....	.....	.....	.....	191,491	191,491
17	Virginian R'y on Slab Fork and Virginian and Western.....	679,443	.....	.....	.....	.....	.....	679,443	679,443
18	Virginian R'y, Main Line, Elmore to Clark's Gap and Elmore Branch.	124,550	.....	.....	.....	.....	.....	124,550	124,550
	Total, Sections Nos. 1 to 12, inclusive	3,023,805	1,008,210	1,464,430	.....	2,472,640	551,165	.....	551,165
	Total, Sections Nos. 13 to 18, inclusive	3,333,348	.....	.....	1,076,710	1,076,710	.....	2,256,638	2,256,638
	Grand Total.....	6,357,153	1,008,210	1,464,430	1,076,710	3,549,350	551,165	2,256,638	2,807,803

(Sections Nos. 1 to 18, Inclusive)

Estimated Number of Cars of Coal Loaded at Local and Joint Mines by the Chesapeake and Ohio Railway and Virginian Railway and Shipped Westbound via Thurmond, Prince, Deepwater and Matoaka, Calendar Year 1927.

Section No.		Total Estimated Number of cars, year 1927	Originated by Chesapeake and Ohio Railway			Originated by Virginian Railway		
			Via Thurmond	Via Prince	Total	Via Deepwater and C. & O.	Via Matoaka and N. & W.	Total
1	Deepwater, Oak Hill Junction, Virgian R'y	158	.....	.....	.....	80	78	158
2	White Oak Branch, Virginian R'y..	3,734	1,251	.....	1,251	.....	2,483	2,483
3	White Oak Branch of C. & O. R'y.	2,829	2,829	.....	2,829	.....	.....	.....
4	Prince Hill Branch of C. & O. R'y	2,222	2,220	.....	2,222	.....	.....	.....
5	Kanawha, Glen Jean and Eastern R'y	7,153	7,152	.....	7,152	.....	1	1
6	Loup Creek Branch of C. & O. R'y	11,815	11,813	.....	11,813	.....	2	2
7	Piney Branch of C. & O. R'y, Prince to Westwood	14,722	.....	10,155	10,155	.....	4,567	4,567
8	Glade Creek and Raleigh R'y.....	967	.....	967	967	.....	.....	.....
9	Piney Branch of C. & O. R'y, South of Westward and Virginian R'y, Main Line, Jenny Gap to Harper	10,001	.....	5,939	5,939	242	3,820	4,062
10	Virginian R'y, Main Line on Paint Creek, Harper to Silver Gap....	1,170	.....	.....	.....	481	689	1,170
11	Raleigh and Southwestern Branch of C. & O. R'y on Piney Creek..	6,643	.....	3,204	3,204	.....	3,439	3,439
12	Piney River and Paint Creek Branch of C. & O. R'y	14,370	.....	6,515	6,515	.....	7,855	7,855
13	Virginian R'y, Branch on Piney Creek, South of Pemberton....	1,431	.....	.....	.....	187	1,244	1,431
14	Winding Gulf Branches of C. & O. and Virginian R'ys	35,325	.....	16,794	16,794	5,093	13,458	18,551

15	Stone Coal Branch of Virginian R'y	21,883	.....	10,191	10,191	1	11,646	11,647
16	Virginian R'y, Stone Coal and Mullens	4,799	.....	.....	.....	398	4,401	4,799
17	Virginian R'y on Slab Fork and Virginian and Western	17,029	.....	.....	.....	4,977	12,052	17,029
18	Virginian R'y, Main Line, Elmore to Clark's Gap and Elmore Branch	3,121	.....	.....	.....	132	2,989	3,121
	Total, Sections Nos. 1 to 12, inclusive	75,784	25,267	26,780	52,047	803	22,934	23,737
	Total, Sections Nos. 13 to 18, inclusive	83,543	.....	26,985	26,985	10,788	45,770	56,558
	Grand Total	159,327	25,267	53,765	79,032	11,591	68,704	80,295

(Sections Nos. 1 to 18, Inclusive)

Tonnage of Coal Loaded at Local and Joint Mines by the Chesapeake and Ohio Railway and Virginian Railway and Shipped Westbound via Thurmond, Prince, Deepwater and Matoaka, January to September, 1927, Inclusive

Section No.	Name of section	Total tonnage, Westbound Jan. to Sept., 1927, inclusive,	Originated by Chesapeake and Ohio Railway			Originated by Virginian Railway		
			Via Thurmond	Via Prince	Total	Via Deepwater and C. & O.	Via Matoaka and N. & W.	Total
1	Deepwater, Oak Hill Junction, Virgian R'y	6,290	.....	.....	.....	3,176	3,114	6,290
2	White Oak Branch, Virginian R'y.	148,997	49,920	.....	49,920	.....	99,077	99,077
3	White Oak Branch of C. & O. R'y.	112,870	112,870	.....	112,870	.....	.....	.....
4	Prince Hill Branch of C. & O. R'y	88,660	88,660	.....	88,660	.....	.....	.....
5	Kanawha, Glen Jean and Eastern R'y	285,395	285,340	.....	285,340	.....	55	55
6	Loup Creek Branch of C. & O. R'y	471,420	471,350	.....	471,350	.....	70	70
7	Piney Branch of C. & O. R'y, Prince to Westwood	587,409	.....	405,180	405,180	.....	182,229	182,229
8	Glade Creek and Raleigh R'y	38,600	.....	38,600	38,600	.....	.....	.....
9	Piney Branch of C. & O. R'y, South of Westward and Virginian R'y, Main Line, Jenny Gap to Harper	399,073	.....	236,955	236,955	9,665	152,453	162,118
10	Virginian R'y, Main Line on Paint Creek, Harper to Silver Gap	46,670	.....	.....	.....	19,197	27,473	46,670
11	Raleigh and Southwestern Branch of C. & O. R'y on Piney Creek	265,044	.....	127,845	127,845	.....	137,199	137,199
12	Piney River and Paint Creek Branch of C. & O. R'y	573,377	.....	259,930	259,930	.....	313,447	313,447
13	Virginian R'y, Branch on Piney Creek South of Pemberton	57,082	.....	.....	.....	7,444	49,638	57,082

14	Winding Gulf Branches of C. & O. and Virginian R'ys	1,409,454	.....	670,080	670,080	203,187	536,187	739,374
15	Stone Coal Branch of Virginian R'y	871,328	.....	406,630	406,630	64	464,634	464,698
16	Virginian R'y, Stone Coal and Mullens	191,491	.....	.....	.....	15,893	175,598	191,491
17	Virginian R'y on Slab Fork and Virginian and Western	679,443	.....	.....	.....	198,555	480,888	679,443
18	Virginian R'y, Main Line, Elmore to Clark's Gap and Elmore Branch	124,550	.....	.....	.....	5,281	119,269	124,550
	Total, Sections Nos. 1 to 12, inclusive	3,023,805	1,008,140	1,068,510	2,076,650	32,038	915,117	947,155
	Total, Sections Nos. 13 to 18, inclusive	3,333,348	.....	1,076,710	1,076,710	430,424	1,826,214	2,256,638
	Grand Total	6,357,153	1,008,140	2,145,220	3,153,360	462,462	2,741,331	3,203,793

(Here follows recapitulation, side folio 198)

New River Coal District of West Virginia

(Sections Nos. 1 to 18, Inclusive)

Tonnage of Coal Loaded at Mines on Chesapeake and Ohio Railway and Virginian Railway and at Joint Mines Served by Both Railways and Tonnage Shipped Eastbound and Westbound from Each Mine or Section and via Each Railway, January to September, 1927, Inclusive

Recapitulation

Section number	Name of section	Number of Mines				Tonnage loaded Jan. to Sept., 1927	Shipped via Chesapeake and Ohio Railway			Shipped via Virginian Railway		
		Joint	C. & O.	Virginian	Total		Eastbound	Westbound	Total	Eastbound	Westbound	Total
1	Deepwater, Oak Hill Jct, Virginian R'y			5	5	422,119				415,829	6,290	422,119
2	White Oak Branch, Virginian R'y	3			3	488,970	81,680	49,920	131,600	258,293	99,077	357,370
3	White Oak Branch of C. & O. R'y	3	1		4	341,105	85,720	112,870	198,590	142,515		142,515
4	Price Hill Branch of C. & O. R'y	1			1	214,176	73,620	88,660	162,280	51,896		51,896
5	Kanawha, Glen Jean and Eastern R'y	9		1	10	574,629	35,000	285,340	320,340	254,234	55	254,289
6	Loup Creek Branch of C. & O. R'y	3	9		12	932,673	363,930	471,350	835,280	97,323	70	97,303
7	Piney Branch of C. & O. R'y, Prince to Westwood	4	9		13	955,370	251,110	405,180	656,290	116,851	182,229	299,080
8	Glade Creek and Raleigh R'y		2		2	96,100	57,500	38,600	96,100			
9	Piney Branch of C. & O. R'y, south of Westwood and Virginian R'y, Main Line, Jenny Gap to Harper	4		1	5	884,796	160,665	236,955	397,620	235,058	162,118	487,176
10	Virginian R'y, Main Line on Paint Creek, Harper to Silver Gap			2	2	194,210				147,540	46,670	194,210
11	Raleigh and Southwestern Branch of C. & O. R'y on Piney Creek	3	1		4	610,502	155,645	127,845	283,490	189,813	137,199	327,012
12	Piney River and Paint Creek Branch of C. & O. R'y	4			4	775,651	79,100	259,930	339,030	123,174	313,447	436,621
13	Virginian R'y Branch on Piney Creek south of Pemberton			7	7	525,336				468,254	57,082	525,336
14	Winding Gulf Branches of C. & O. and Virginian Railways	6	1	6	13	3,201,462	618,185	670,080	1,288,265	1,173,823	739,374	1,913,197
15	Stone Coal Branch of Virginian R'y	14			14	1,759,909	280,680	406,630	687,310	607,901	464,698	1,072,599
16	Virginian R'y, Stone Coal and Mullens	1		8	9	646,277				454,786	191,491	646,277
17	Virginian R'y on Slab Fork and Virginian and Western			8	8	1,235,893				556,450	679,443	1,235,893
18	Virginian R'y, Main Line, Elmore to Clark's Gap and Elmore Branch			9	9	748,062				623,512	124,550	748,062
	Total, Sections Nos. 1 to 12, inclusive	34	22	9	65	6,490,301	1,343,970	2,076,650	3,420,620	2,122,526	947,155	3,069,681
	Total, Sections Nos. 13 to 18, inclusive	21	1	38	60	8,116,939	898,865	1,076,710	1,975,575	3,884,726	2,256,638	6,141,364
	Grand Total	55	23	47	125	14,607,240	2,242,835	3,153,360	5,396,195	6,007,252	3,203,793	9,211,045

New River Coal District of West Virginia
(Sections Nos. 1 to 18, Inclusive)

Tonnage of Coal Loaded at Mines on Chesapeake and Ohio Railway and Virginian Railway and at Joint Mines Served by Both Railways and Tonnage Shipped Eastbound and Westbound from Each Mine or Section and via Each Railway, January to September, 1927, Inclusive

Section number	Name of mine	Local or Joint	Tonnage loaded, Jan. to Sept. 1927	Shipped via Chesapeake and Ohio Railway			Shipped via Virginian Railway		
				Eastbound	Westbound	Total	Eastbound	Westbound	Total
1	Deepwater, Oak Hill Jct., Virginian Railway:								
	Beards Fork	Virginian	178,070	.....	.....	.....	178,070	.....	178,070
	Page	Virginian	163,251	.....	.....	.....	163,251	.....	163,251
	Glenloe	Virginian	18,536	.....	.....	.....	18,536	.....	18,536
	Ingram Branch	Virginian	30,142	.....	.....	.....	24,326	5,816	30,142
	Lick Fork (Hysteam)	Virginian	32,120	.....	.....	.....	31,646	474	32,120
	Total		422,119	.....	.....	.....	415,829	6,290	422,119
2	White Oak Branch, Virginian Railway:								
	Oakwood	Joint	204,265	50,870	35,660	86,530	102,528	15,207	117,735
	Summerlee	Joint	235,030	26,420	8,520	34,940	128,668	71,422	200,000
	Lochgelly	Joint	49,675	4,390	5,740	10,130	27,097	12,448	39,545
	Total		488,970	81,680	49,920	131,600	258,293	99,077	357,370
3	White Oak Branch of C. & O. Railway:								
	Veazy	C & O	4,530	4,430	100	4,530	.....	.....	.....
	Scarbro	Joint	155,760	33,250	49,610	82,860	72,900	.....	72,900
	Whipple	Joint	165,235	47,270	48,350	95,620	69,615	.....	69,615
	Nichol	Joint	15,580	770	14,810	15,580	.....	.....	.....
	Total		341,105	85,720	112,870	198,590	142,515	.....	142,515

Section number	Name of mine	Local or Joint	Tonnage loaded, Jan. to Sept. 1927	Shipped via: Chesapeake and Ohio Railway — Eastbound	Chesapeake and Ohio Railway — Westbound	Chesapeake and Ohio Railway — Total	Virginian Railway — Eastbound	Virginian Railway — Westbound	Virginian Railway — Total
4	Price Hill Branch of C. & O. Railway:								
	Price Hill	Joint	214,176	73,620	88,660	162,280	51,896	.....	51,896
5	Kanawha, Glen Jean and Eastern Railway:								
	Derryhale	Joint	17,730	200	680	880	16,850	.....	16,850
	Balwood	Joint	327	.....	.....	.....	327	.....	327
	Lee	Joint	85,503	8,720	56,470	65,190	20,313	.....	20,313
	Kilsyth	Joint	65,100	3,240	43,000	46,240	18,860	.....	18,860
	Fayral	Joint	5,044	580	1,070	1,650	3,394	.....	3,394
	Cepee	Joint	42,228	3,730	35,240	38,970	3,258	.....	3,258
	Oswald	Joint	77,565	4,250	39,020	43,270	34,295	.....	34,295
	Tamroy	Joint	97,930	4,770	31,360	36130	61,800	.....	61,800
	Siltix	Joint	176,710	9,510	78,500	88,010	88,700	.....	88,700
	Packs Branch	Virginian	6,492	.....	.....	.....	6,437	55	6,492
[fol. 200]	Total		574,629	35,000	285,340	320,340	254,234	55	254,289
6	Loup Creek Branch of C. & O. Railway:								
	Dun Glen	C & O	5,125	3,150	1,975	5,125	.....	.....	.....
	Cadle Ridge	C & O	26,760	20,300	6,460	26,760	.....	.....	.....
	Meadow Fork	C & O	4,670	4,200	470	4,670	.....	.....	.....
	Prudence	C & O	85,930	39,120	46,810	85,930	.....	.....	.....
	Harvey	C & O	137,140	92,610	44,530	137,140	.....	.....	.....
	Star	C & O	91,680	39,950	51,730	91,680	.....	.....	.....
	Collins	C & O	38,220	21,100	17,120	38,220	.....	.....	.....
	Sun	Joint with K G J & E Ry	368,135	76,540	202,550	279,090	89,045	.....	89,045

Dunloop	Joint with K G J & E R'y.....	30,450	11,760	18,360	30,120	330	.....	330
Sugar Creek	Joint with K G J & E R'y.....	44,303	1,330	34,955	36,285	7,948	70	8,018
Turkey Knob	C & O.....	84,290	46,500	37,790	84,290	.....	.....	.....
McDonald	C & O.....	15,970	7,370	8,600	15,970	.....	.....	.....
Total.....		932,673	363,930	471,350	835,280	97,323	70	97,393
7 Piney Branch of C. & O. Railway, Prince to Westwood:								
Royal	C & O.....	13,780	9,570	4,210	13,780	.....	.....	.....
Terry No. 1.....	C & O.....	40,510	30,220	10,290	40,510	.....	.....	.....
Terry No. 2.....	C & O.....	6,300	4,680	1,620	6,300	.....	.....	.....
Piney No. 1.....	C & O.....	313,240	62,770	250,470	313,240	.....	.....	.....
Piney Poca	C & O.....	1,190	1,190	.....	1,190	.....	.....	.....
Black Knight No. 7 (Raleigh No. 7)	C & O.....	52,375	46,100	6,275	52,375	.....	.....	.....
Black Knight No. 3 (Raleigh No. 3)	Joint.....	275,334	55,880	109,525	165,405	33,794	76,135	109,929
Black Knight No. 1 (Raleigh No. 1)	Joint.....	12,140	9,550	50	9,600	2,497	52	2,549
Black Knight No. 5 (City Coal No, 2)	Joint.....	1,192	100	.....	100	988	104	1,092
Mabscott	Joint.....	203,790	7,080	11,200	18,280	79,572	105,938	185,510
Lanark	C & O.....	19,660	11,830	7,830	19,660	.....	.....	.....
Wright No. 1.....	C & O.....	11,430	8,930	2,500	11,430	.....	.....	.....
Wright No. 2.....	C & O.....	4,420	3,210	1,210	4,420	.....	.....	.....
Total.....		955,370	231,110	405,180	656,290	116,851	182,229	299,080

Section number	Name of mine	Local or Joint	Tonnage loaded, Jan. to Sept. 1927	Shipped via: Chesapeake and Ohio Railway Eastbound	Chesapeake and Ohio Railway Westbound	Chesapeake and Ohio Railway Total	Virginian Railway Eastbound	Virginian Railway Westbound	Virginian Railway Total
8	Glade Creek and Raleigh Railway:								
	Blue Jay No. 5...	C & O.....	38,200	36,050	2,150	38,200	.....	.....	.....
	Blue Jay No. 6...	C & O.....	57,900	21,450	36,450	57,900	.....	.....	.....
	Total.....		96,100	57,500	58,600	96,100	.....	.....	.....
[fol. 201]									
9	Piney Creek Branch of C. & O. Railway, south of Westwood and Virginian Railway, Main Line, Jenny Gap to Harper:								
	Neal	Virginian..	3,248	.....	.....	.....	3,248	.....	3,248
	Eccles No. 5.....	Joint.....	260,966	29,840	131,420	161,260	30,680	69,026	99,706
	Eccles No. 6.....	Joint.....	213,239	46,125	88,415	134,540	62,417	16,282	78,699
	Summit	Joint.....	43,705	.....	.....	.....	19,083	24,622	43,705
	Glen White	Joint.....	363,638	84,700	17,120	101,820	209,630	52,188	261,818
	Total.....		884,796	160,665	236,955	397,620	325,058	162,118	487,176
10	Virginian Railway, Main Line, on Paint Creek, Harper to Silver Gap:								
	Long Branch	Virginian..	158,485	.....	.....	.....	112,255	46,230	158,485
	Willis Branch	Virginian..	35,725	.....	.....	.....	35,285	440	35,725
	Total.....		194,210	.....	.....	.....	147,540	46,670	194,210

11	Raleigh and Southwestern Branch of C. & O. Railway on Piney Creek:								
	Black Knight No. 6 (Raleigh No. 6)	Joint.....	378,779	49,300	115,700	165,000	81,027	132,752	213,779
	Crab Orchard	Joint.....	37,489	25,290	1,810	27,100	9,761	628	10,389
	Lillybrook No. 4..	Joint.....	169,564	56,635	10,085	66,720	99,025	3,819	102,844
	Woodpeck	C & O.....	24,670	24,420	250	24,670	.....	.....	.....
	Total.....		610,502	155,645	127,845	283,490	189,813	137,199	327,012
12	Piney River and Paint Creek Branch of C. & O. Railway:								
	Cranberry No. 1 ..	Joint.....	184,020	64,460	71,130	135,590	44,001	4,429	48,430
	Cranberry No. 2 ...	Joint.....	169,210	3,350	11,300	14,650	32,392	122,168	154,560
	Cranberry No. 3 ..	Joint.....	236,445	4,550	24,900	29,450	45,805	161,190	206,995
	Piney No. 6.....	Joint.....	185,976	6,740	152,600	159,340	976	25,660	26,636
	Total.....		775,651	79,100	259,930	339,030	123,174	313,447	436,621
13	Virginian Railway Branch on Piney Creek south of Pemberton:								
	Bacontown	Virginian..	54,779	.....	.....	.....	54,430	349	54,779
	Ralco	Virginian..	78,796	.....	.....	.....	43,554	35,242	78,796
	Douglas	Virginian..	112,558	.....	.....	.....	107,958	4,600	112,558
	Leckie	Virginian..	124,473	.....	.....	.....	119,865	4,608	124,473
	Lillybrook No. 2..	Virginian..	104,143	.....	.....	.....	92,052	12,091	104,143
	Willabet	Virginian..	10,023	.....	.....	.....	9,831	192	10,023
	Sterling	Virginian..	40,564	.....	.....	.....	40,564	.....	40,564
	Total.....		525,336	.....	.....	.....	468,254	57,082	525,336

[fol. 202]

Section number	Name of mine	Local or Joint	Tonnage loaded, Jan. to Sept. 1927	Shipped via: Chesapeake and Ohio Railway Eastbound	Chesapeake and Ohio Railway Westbound	Chesapeake and Ohio Railway Total	Virginian Railway Eastbound	Virginian Railway Westbound	Virginian Railway Total
14	Winding Gulf Branches of C. & O. and Virginian Railways:								
	Pemberton	Joint	108,334	20,780	29,220	50,000	15,852	42,482	58,334
	Affinity	Joint	258,048	111,320	16,020	127,340	52,047	78,661	130,708
	Winding Gulf No. 2	C & O	272,155	107,920	164,235	272,155	.....	.....	.....
	Big Stick	Virginian	157,539	.....	.....	.....	92,706	64,833	157,539
	Hot Coal	Virginian	144,508	.....	.....	.....	103,156	41,352	144,508
	Woodbay	Virginian	278,245	.....	.....	.....	117,921	160,324	278,245
	Mistletoe (Winding Gulf No. 4)	Virginian	121,491	.....	.....	.....	51,021	70,470	121,491
	Winding Gulf No. 1	Virginian	194,099	.....	.....	.....	79,693	114,406	194,099
	MacAlpin	Joint	350,204	115,385	126,295	241,680	87,137	21,384	108,521
	Stotesbury	Joint	529,603	89,060	155,330	244,390	221,910	63,303	285,213
	Tams	Joint	297,531	70,060	121,410	191,470	106,061	.....	106,061
	Helen No. 3 and No. 4 (East Gulf No. 3 and No. 4)	Joint	281,144	103,690	57,570	161,230	82,960	29,954	119,914
	Helen No. 5 (East Gulf No. 5)	Virginian	208,564	.....	.....	.....	156,359	52,205	208,564
	Total		3,201,462	618,185	670,080	1,288,265	1,173,823	739,374	1,913,197
15	Stone Coal Branch of Virginian Railway:								
	Tommy Creek	Joint	97,908	17,660	40,850	58,510	13,542	25,856	39,398
	Rhodell	Joint	55,296	4,390	8,670	13,060	4,699	37,537	42,236

Minter	Joint	140,725	13,160	23,170	36,330	31,932	72,463	104,395
C. H. Mead No. 1.	Joint	111,717	4,350	67,800	72,150	23,194	16,373	39,567
C. H. Mead No. 2.	Joint	185,285	11,530	108,910	120,440	38,512	26,333	64,845
Killarney	Joint	140,233	8,880	18,450	27,330	41,482	71,421	112,903
Vanwood	Joint	161,597	22,850	72,870	95,720	16,796	49,081	65,877
Besoco (Beckley Smokeless)	Joint	142,771	47,590	18,000	65,590	38,439	38,742	77,181
Lego	Joint	144,322	12,020	4,200	16,220	94,180	33,922	128,102
Pickshin	Joint	60,840	20,960	5030	25,990	23,809	11,041	34,850
Lillybrook No. 3.	Joint	201,298	60,330	32,190	92,520	64,976	43,802	108,778
Lillybrook No. 1.	Joint	197,687	50,340	5,770	56,110	135,192	6,385	141,577
Princewick	Joint	95,089	6,350	200	6,550	75,436	13,103	88,539
Kilpoca (Killarney No. 2)	Joint	25,141	270	520	790	5,712	18,639	24,351
Total		1,759,909	280,680	406,630	687,310	607,901	464,698	1,072,599
16 Virginian Railway, Stone Coal and Mullens:								
J. A. Wood	Virginian	43,635	.....	.....	.....	16,195	27,440	43,635
Wacomah	Virginian	33,559	.....	.....	.....	18,612	14,947	33,559
Amigo	Joint	62,075	.....	.....	.....	28,055	34,020	62,075
Devils Fork	Virginian	99,647	.....	.....	.....	37,276	62,371	99,647
Iroquois	Virginian	82,310	.....	.....	.....	80,354	1,956	82,310
Wyoming (Wyco)	Virginian	194,688	.....	.....	.....	181,757	12,931	194,688
Miller Poca. No. 1	Virginian	46,265	.....	.....	.....	40,317	5,948	46,265
Miller Poca. No. 2	Virginian	47,273	.....	.....	.....	44,296	2,977	47,273
Madeleine	Virginian	36,825	.....	.....	.....	7,924	28,901	36,825
Total		646,277	.....	.....	.....	454,786	191,491	646,277

[fol. 203]

Section number	Name of mine	Local or Joint	Tonnage loaded, Jan. to Sept. 1927	Shipped via: Chesapeake and Ohio Railway Eastbound	Chesapeake and Ohio Railway Westbound	Chesapeake and Ohio Railway Total	Virginian Railway Eastbound	Virginian Railway Westbound	Virginian Railway Total
17	Virginian Railway on Slab Fork and Virginian and Western:								
	Slab Fork No. 1	Virginian	250,755	.....	.....	.....	202,397	48,358	250,755
	Glen Rogers	Virginian	521,189	.....	.....	.....	77,706	443,483	521,189
	Otsego	Virginian	30,484	.....	.....	.....	15,917	14,567	30,484
	Caloric (Poca Pack)	Virginian	45,016	.....	.....	.....	40,971	4,045	45,016
	Nuriva	Virginian	62,665	.....	.....	.....	25,280	37,385	62,665
	Morrison	Virginian	226,805	.....	.....	.....	179,955	46,850	226,805
	Faith No. 1	Virginian	88,151	.....	.....	.....	12,931	75,220	88,151
	Faith No. 2	Virginian	10,828	.....	.....	.....	1,293	9,535	10,828
	Total		1,235,893	.....	.....	.....	556,450	679,443	1,235,893
18	Virginian Railway, Main Line, Elmore to Clark's Gap and Elmore Branch:								
	Mead Poca	Virginian	37,965	.....	.....	.....	20,956	17,009	37,965
	Itmann	Virginian	264,964	.....	.....	.....	218,392	46,572	264,964
	Alpoca	Virginian	105,926	.....	.....	.....	103,543	2,383	105,926
	Thermo Poca	Virginian	56,764	.....	.....	.....	53,659	3,105	56,764
	Monticello	Virginian	59,842	.....	.....	.....	59,545	297	59,842
	Flat Top	Virginian	60,813	.....	.....	.....	47,978	12,835	60,813
	Covel	Virginian	83,194	.....	.....	.....	78,486	4,708	83,194
	Garwood	Virginian	38,397	.....	.....	.....	9,062	29,335	38,397
	Micajah Poca	Virginian	40,197	.....	.....	.....	31,891	8,306	40,197
	Total		748,062	.....	.....	.....	623,512	124,550	748,062

[fol. 203½] The witness testified further:

Page 6 of this Exhibit No. 26 shows the total tonnage loaded at 55 joint mines, 23 Chesapeake local mines, and 47 Virginian local mines, a total of 125 mines, during the year 1927, in that part of the New River coal district of West Virginia described as Sections Nos. 1 to 18, inclusive. The several sections are described on this page opposite the section numbers, and a separation is shown of the total tonnage of coal loaded, first, as between the Chesapeake and the Virginian, and second, with respect to each railroad as between tonnage eastbound and westbound.

Pages 7 to 11, inclusive, show the same information by individual mines grouped by sections and the section totals which are carried forward to page 6.

Page 5 shows the distribution of the westbound tonnage originated by both the Chesapeake and the Virginian during the first nine months of 1927 as between the four existing routes:

1. Chesapeake direct via Prince.
2. Chesapeake direct via Thurmond.
3. Virginian, Deepwater and Chesapeake.
4. Virginian, Matoaka and Norfolk.

Page 4 shows the same information as to the westbound coal shipments by existing routes, except that it is expressed in average carloads on an annual basis. The tonnage from each section via each route, as shown on page 5 for nine months, has been increased one-third to arrive at the estimated annual tonnage and this result divided by 53.2 tons which was determined to be the average tonnage per car of westbound coal.

Page 3 shows the tonnage from each section for the first nine months of 1927, redistributed by routes, after the construction of the proposed extensions, assuming that the [fol. 204] coal should move and eventually will move by way of the shorter and more economical natural routes. This is done to estimate the tonnage available to the new route down the Guyandot River on the most conservative basis, taking only that tonnage which is naturally tributary to this route.

Page 2 shows the same information as page 3 except that the amount of business moving via each route is estimated on an annual basis and expressed in average carloads. The tonnage for nine months was increased to an annual basis

by adding one-third and the result divided by 53.2 tons, the average carload.

Page 1, is the summary and shows, in average carloads of 53.2 tons each, the amount of coal business that will be available for movement over the proposed extensions from the Winding Gulf section (sections 13 to 18, inclusive).

Briefly stated this shows 45,770 cars, 152 cars per day, originating on the Virginian now moving via Matoaka and 10,788 cars, 36 cars per day, originating on the Virginian now moving via Deepwater, a total of 56,558 cars, 188 cars per day, originating on the Virginian which will be available for movement over the proposed extensions and 26,985 cars, 90 cars per day, originating on the Chesapeake which now move via Prince and will be available for movement over the proposed extensions making a total of 83,343 cars, 278 cars per day, available for such movement.

The figures which I have given as to the number of cars per day are obtained by dividing the annual totals by 300 representing the approximate number of days of train service required to move the business.

These figures as to the Chesapeake—and I mean all of the figures in the exhibit I am describing—are taken from the monthly reports of the Car Allotment Commission and the separation as between eastbound and westbound shipments from the Daily Mine Reports to that Commission. As to the Virginian tonnage, the total is taken from the monthly Car Allotment Report; the westbound tonnage via Deepwater was compiled by the Accounting Department of [fol. 205] the Chesapeake from the interline freight reports and the tonnage via Matoaka was obtained principally from monthly bulletins distributed by shippers' associations.

It is probable that a very small part of this westbound tonnage was destined to stations or junctions on the Chesapeake between Deepwater and Kenova or to stations on the Norfolk between Matoaka and Kenova but considering the increase in the total of the westbound tonnage during the past three years it is my judgment that the tonnage which I have stated as being available for movement over the new lines is the minimum to be expected by the time such new lines can be completed and put in operation.

I may say, in addition, that the tonnage of coal originated by the Chesapeake in the Logan district in the first nine months of 1927 was as follows:

Eastbound	2,455,605 net tons (2,000 pounds)
Westbound	14,735,445 "
Total	17,191,050 "

NOTE.—The opinion of the Court refers to facts concerning shipments from 27 joint mines which enjoy joint rates to the west via the Chesapeake's own line and via the line of the Virginian to Matoaka and thence via the Norfolk, but do not enjoy such rates via the Virginian to a connection with the Chesapeake and thence via the Chesapeake. It is only by comparing Exhibit No. 24 with Exhibit No. 26 that it is possible to show from the record the facts concerning these joint mines. The facts were so developed on brief in the lower court, and the following table supplied, which is based on and taken from Exhibits Nos. 24 and 26, and is included here for convenience of reference:

[fol. 206] Statement of Tonnages of Coal Moving Westbound via the Chesapeake on the One Hand and the Virginian (via Matoaka and the Norfolk) on the Other Hand (but not by the Virginian in Connection with the Chesapeake), from Twenty-seven Joint Mines Named Below, Served Jointly by the Chesapeake and the Virginian During the First Nine Months of 1927

Section No.	Mine	Total westbound	Moved by Chesapeake	Moved by Virginian
2	Oakwood	50,867	35,660	15,207
	Summerlee	79,942	8,520	71,422
	Lochgelly	18,188	5,740	12,448
7	Black Knight No. 3	185,660	109,525	76,135
	Black Knight No. 1	102	50	52
	Mabscot	117,438	11,200	105,938
9	Glen White	69,308	17,120	52,188
11	Black Knight No. 6	248,452	115,700	132,752
	Crab Orchard	2,438	1,810	628
12	Cranberry No. 1	75,559	71,130	4,429
	Cranberry No. 2	133,468	11,300	122,168
	Cranberry No. 3	186,090	24,900	161,190
	Piney No. 6	178,260	152,900	25,660
15	Tommy Creek	66,706	40,850	25,856
	Rhodell	46,207	8,670	37,537
	Minter	95,633	23,170	72,463
	C. H. Meade No. 1	84,173	67,800	16,373
	Killarney	89,871	18,450	71,421
	Vanwood	121,951	72,870	49,081
	Besoco	56,742	18,000	38,742
	Lego	38,122	4,200	33,922

Section No.	Mine	Total westbound	Moved by Chesapeake	Moved by Virginian
	Pickshin	16,071	5,030	11,041
	Lillybrook No. 3	75,992	32,190	43,802
	Princewick	13,303	200	13,103
	C. H. Meade No. 2	135,243	108,910	26,333
	Lillybrook No. 1	12,155	5,770	6,385
	Kilpoca	19,159	520	18,639
	Total	2,216,800	971,885	1,244,915
			43.84%	56.16%

The witness testified further:

I have made an estimate of the savings in cost of transportation which will result from the utilization of the proposed extensions for the movement of westbound coal from the Winding Gulf District and eastbound coal from the Logan District and will state the factors and methods which I have used in estimating such savings. My estimate is based upon a certain plan of operation which is as follows:

The westbound tonnage of the Chesapeake from Winding Gulf section, about 90 cars per day, will be assembled at Stone Coal Junction and moved direct from there to Peach Creek yard on the Logan Division. The westbound Virginia-Norfolk tonnage 152 cars per day and the westbound Virginian-Chesapeake tonnage 36 cars per day making a [fol. 207] total of 188 cars per day of Virginian coal from the Winding Gulf District will move direct from Elmore Yard to Peach Creek Yard. This will make a total of 278 cars per day to be moved in three trains of 93 cars each.

The empty cars for the Chesapeake tonnage, that is 90 cars per day, will be supplied from the east through Prince and Raleigh as at present; one half of the empty cars for the Virginian tonnage, that is, 94 cars per day, will be supplied by the Virginian and such cars will be returned empty through Peach Creek and over the proposed extensions to Elmore. The remaining one-half of the empty cars for Virginian loading, that is 94 cars per day, will be supplied by the Chesapeake through Prince and Raleigh and will be utilized by the Virginian for loading on its Piney Creek Branch (Section 13) and in sections 14 and 15.

Of the 56,558 cars originated by the Virginian in the Winding Gulf section 19,962 came from sections 13 and 14, and 11,647 came from Section 15; hence if the Chesapeake

supplied 28,279 cars through Pemberton, being one-half of the total required for westbound loading, these cars would take care of westbound loading in sections 13 and 14 and a part of the westbound loading on the Stone Coal Branch, Section 15.

It may also be observed, by referring to page 6 of Exhibit 26, that by using these Chesapeake cars for eastbound loading as well as westbound loading in sections 13 and 14 and supplying its own cars for westbound loading in other sections further south, the Virginian could virtually avoid hauling any cars up the Winding Gulf Branch to Pemberton. The eastbound Virginia empties moving through Peach Creek and over the new line will require one train per day from Peach Creek to Elmore and leave two eastbound trains per day available for the movement of eastbound coal from the Logan District, approximately 81 cars per day or a total of 24,420 cars per annum. These cars will be moved from Stone Coal Junction to Raleigh by present mine run crews in lieu of the 90 westbound cars per day which these crews now move to Raleigh but which [fol. 208] under the proposed plan they will assemble at Stone Coal Junction instead of Raleigh.

The empty cars for loading in the Logan District will be supplied from the west the same as at present. There will be no change in the method of supplying empty coal cars for Chesapeake loading in either the New River District or the Logan District and the cross haul of loaded cars between Stone Coal Junction and Peach Creek over the new line will avoid the cross haul of empties in the same way and to the same extent that the cross haul of empties is now avoided on the main line between Quinnimont and Barboursville. This plan of operation would involve two substantial changes in the movement of empty cars for Virginian loading as follows:

1. Virginian empty cars returning from the west will move over the new line instead of via Matoaka or Deepwater as the case may be at present.

2. If the westbound business moves by way of Gilbert and the Chesapeake as contemplated, the Chesapeake will supply empty cars to the Virginian at Pemberton to the extent that empty cars are now supplied by the Norfolk to

the Virginian at Matoaka, and in the plan of operation which I have described I have estimated this at one-half of the Virginian's requirements.

In making my estimates of transportation costs I have followed a commonly used method which consists of measuring the amount of train, engine and car service over the respective routes, and applying thereto the unit costs applicable to the units of service. The factors used in measuring the quantity of service are:

1, grades and resulting train loads;

2, distance; and

3, speed, taking into consideration other operating conditions in so far as they are known or can be appraised.

The units of service are:

1, the train hour as to train and engine service costs;

[fol. 209] 2, the car mile as to the cost of car repairs and depreciation; and

3, the car day as to interest, taxes and insurance on freight cars.

The unit cost per train hour is based upon the actual experience of the Chesapeake and this is also true as to the unit cost per car mile.

The unit cost per car day for interest, taxes and maintenance is based upon my knowledge of such costs from experience.

The train loads and train speeds over existing routes of the Chesapeake represent the actual performance as shown by records. These actual data are used as a basis for estimating the performance over the proposed new line and also to some extent for estimating these factors on the Virginian and the Norfolk.

I have not obtained the actual data as to trainloads and train speeds over those particular sections of the Virginian and Norfolk involved in this study. The comparisons are based upon the use of the Chesapeake Mallet type 2-6-6-2 locomotive, known as type H-4, tractive power 74,200 pounds, over all of the alternative routes with helper engines of the same type where helpers are used or can be economically used. In making these comparisons I have deliberately disregarded the fact that the Virginian has

electric operation between Mullens and Matoaka and the Norfolk has electric operation between Clift Yard and Iaeger on the route from Elmore to Kenova, via Matoaka, for notwithstanding these electric services it is my judgment that the comparisons made on the basis of steam operations using the same locomotive over all routes afford an accurate measure of the difference in the physical characteristics of the alternative routes as they affect transportation costs, inasmuch as only the direct train service costs are considered.

I have prepared an exhibit entitled "Transportation Savings."

[fol. 210] Thereupon, there was offered and admitted in evidence, Exhibit No. 27, which is in the following form:

(Here follows Exhibit No. 27, marked side folio pp. 211-224)

Docket No. 4818

EXHIBIT 27, WITNESS MARSHALL

Summary of Estimated Savings in Cost of Transportation Which Will Result from the Use of Proposed Extensions for Rerouting Existing Coal Traffic

Train service cost based on estimated number of cars to be moved during the year 1927, page 4	$501,466.11
Savings in cost of Repairs, Depreciation and Retirement of coal cars, page 5	69,136.88
Saving in time of movement of loaded and empty coal cars Virginian and Chesapeake Coal Traffic, pages 7 and 8	38,569.70
Total Savings	$609,172.69

Summary of Train Service Costs per Car and Total Cost Based Upon Estimated Number of Cars to be Moved During the Year 1927

Elmore to Kenova

	Distance	Cost per car	No. of cars	Total cost	Saving
Existing Routes					
Via Matoaka	198.9	$11.97	45,770	$547,896.90	
Via Deepwater	151.9	11.54	10,788	124,463.52	
Total cost via existing routes			56,558	$672,360.42	
Proposed Route					
Via Gilbert	151.2	5.67	56,558	320,683.86	
Savings in cost via proposed route					$351,676.56

Stone Coal Junction to Kenova

Existing Route					
Via Raleigh	198.6	$8.88	20,985	$230,626.80	

[fol. 212] Direct Cost of Train Service in Transporting Coal from the New River Coal District of West Virginia to Kenova, W. Va., via Existing Routes Co with the Cost via New Routes Which Will Be Created by the Construction of New Lines from Gilbert to Mullens and Stone Coal Junction to Mullens

Elmore to Kenova via Matoaka

From	To	Distance, miles	Ruling grade	Helpers: Number	Helpers: Miles	Helpers: Grade	Rating, gross tons	Number of cars	Train speed	Train hours	Cost per train hour	Total cost	Co
Elmore	Matoaka	18.5					3,825	52	8.0	†2.50	$19.00	$47.50	
Elmore	Clark's Gap			2	15.4	2.07	3,825	52	8.0	7.70	17.00	130.90	
Matoaka	Bluestone	15.9	0.63				3,975	54	8.0	2.00	19.00	38.00	
Bluestone	Iaeger	46.8	D				3,975	54	10.0	4.68	19.00	88.92	
Iaeger	Williamson	43.8	D				7,380	100	10.0	4.38	19.00	83.22	
Williamson	Kenova	73.9	0.25				x6,238	84	10.0	7.39	19.00	140.41	
Total Westbound		198.9											
Kenova	Williamson	73.9	0.27				1,730	84	12.0	6.16	$19.00	$117.04	
Williamson	Iaeger	43.8	0.50				2,060	100	12.0	3.65	19.00	69.35	
Iaeger	Bluestone	46.8	No service required.										
Bluestone	Matoaka	15.9	1.18				1,112	54	8.0	2.00	19.00	38.00	
Matoaka	Elmore	18.5	1.25				1,071	52	8.0	†2.50	19.00	47.50	
Total Eastbound		198.9											
Grand Total Cost per Car													

x-Same as Peach Creek-Russell.
†-To N. & W. connection.
Cars 53.2 tons net, 73.8 tons gross.

Elmore to Kenova via Deepwater

Elmore	Jenny Gap	15.4					3,200	43.4	8.0	1.93	$19.00	$36.67	
Elmore	Jenny Gap			1	15.4	1.65	3,200	43.4	8.0	3.85	17.00	65.45	
Jenny Gap	Page	36.7	1.10				2,400	32.5	8.0	4.59	19.00	87.21	
Page	Deepwater	8.5	D					x36.0	8.0	1.06	19.00	20.14	
Deepwater	Handley	8.3	D					x36.0	8.0	1.04	19.00	19.76	
Handley	Kenova	83.0	0.30				5,885	80.0	8.9	9.33	19.00	177.27	
Total Westbound		151.9											
Kenova	Handley	83.0	0.30				1,648	80.0	9.5	8.74	$19.00	$166.06	
Handley	Deepwater	8.3	0.27					x36.0	8.0	1.04	19.00	19.76	
Deepwater	Page	8.5	1.70					x36.0	8.0	1.06	19.00	20.14	
Page	Jenny Gap	36.7	(2.02, 175, 1.60) No service required.										
Jenny Gap	Elmore	15.4	D No service required.										
Total Eastbound		151.9											
Grand Total Cost per Car													

x-Daily average number of cars moving this route.
Cars 53.2 tons net, 73.8 tons gross.
D-Descending grade.

] Direct Cost of Train Service in Transporting Coal from the New River Coal District of West Virginia to Kenova, W. Va., via Existing Routes Compared with the Cost via New Routes Which Will Be Created by the Construction of New Lines from Gilbert to Mullens and Stone Coal Junction to Mullens

Elmore to Kenova via Matoaka

From	To	Distance, miles	Ruling grade.	Helpers: Number	Helpers: Miles	Helpers: Grade	Rating, gross tons	Number of cars	Train speed	Train hours	Cost per train hour	Total cost	Cost per car
	Matoaka	18.5											
	Clark's Gap			2	15.4	2.07	3,825	52	8.0	†2.50	$19.00	$47.50	$.91
a	Bluestone	15.9	0.63				3,825	52	8.0	7.70	17.00	130.90	2.52
ne	Iaeger	46.8	D				3,975	54	8.0	2.00	19.00	38.00	.70
	Williamson	43.8	D				3,975	54	10.0	4.68	19.00	88.92	1.65
son	Kenova	73.9	0.25				7,380	100	10.0	4.38	19.00	83.22	.83
							x6,238	84	10.0	7.39	19.00	140.41	1.67
otal Westbound		198.9											$8.28
	Williamson	73.9	0.27				1,730	84	12.0	6.16	$19.00	$117.04	$1.39
son	Iaeger	43.8	0.50				2,060	100	12.0	3.65	19.00	69.35	.69
	Bluestone	46.8	No service required.										
ne	Matoaka	15.9	1.18				1,112	54	8.0	2.00	19.00	38.00	.70
a	Elmore	18.5	1.25				1,071	52	8.0	†2.50	19.00	47.50	.91
otal Eastbound		198.9											$3.69
rand Total Cost per Car													$11.97

me as Peach Creek-Russell.
o N. & W. connection.
s 53.2 tons net, 73.8 tons gross.

Elmore to Kenova via Deepwater

	Jenny Gap	15.4					3,200	43.4	8.0	1.93	$19.00	$36.67	$.84
	Jenny Gap			1	15.4	1.65	3,200	43.4	8.0	3.85	17.00	65.45	1.51
Gap	Page	36.7	1.10				2,400	32.5	8.0	4.59	19.00	87.21	2.68
	Deepwater	8.5	D					x36.0	8.0	1.06	19.00	20.14	.56
er	Handley	8.3	D					x36.0	8.0	1.04	19.00	19.76	.55
	Kenova	83.0	0.30				5,885	80.0	8.9	9.33	19.00	177.27	2.21
otal Westbound		151.9											$8.35
	Handley	83.0	0.30				1,648	80.0	9.5	8.74	$19.00	$166.06	$2.08
er	Deepwater	8.3	0.27					x36.0	8.0	1.04	19.00	19.76	.55
	Page	8.5	1.70					x36.0	8.0	1.06	19.00	20.14	.56
ap	Jenny Gap	36.7	(2.02, 175, 1.60) No service required.										
	Elmore	15.4	D No service required.										
otal Eastbound		151.9											$3.19
rand Total Cost per Car													$11.54

ily average number of cars moving this route.
53.2 tons net, 73.8 tons gross.
eseending grade.

[fol. 213]

Elmore to Kenova via Gilbert

From	To	Distance, miles	Ruling grade	Helpers: Number	Helpers: Miles	Helpers: Grade	Rating, gross tons	Number of cars	Train speed	Train hours	Cost per train-hour	Total cost	C
Elmore	Peach Creek	70.8	D				6,863	93.0	10.0	7.08	$19.00	$134.52	
Peach Creek	Kenova	80.4	0.22				6,238	84.5	9.3	8.65	19.00	164.35	
Total Westbound		151.2											
Kenova	Peach Creek	80.4	0.50				1,741	84.5	11.6	6.93	$19.00	$131.67	
Peach Creek	Elmore	70.8	0.80				1,916	93.0	10.0	x3.54	19.00	67.26	
Total Eastbound		151.2											
Grand Total Cost per Car													

Stone Coal Junction to Kenova via Raleigh

Stone Coal Junction	Raleigh	20.1	Mine run service. No change.										
Raleigh	Quinnimont	14.6					3,225	43.7	4.7	3.11	$19.00	$59.09	
Quinnimont	Handley	50.9					3,690	50.0	10.3	4.94	19.00	93.86	
Handley	Kenova	83.0					5,885	79.8	8.9	9.33	19.00	177.27	
Total Westbound		168.6											
Kenova	Handley	83.0	0.32				1,644	79.8	9.5	8.74	$19.00	$166.06	
Handley	Quinnimont	50.9	No service required.										
Quinnimont	Raleigh	14.6	2.20				900	43.7	4.7	3.11	19.00	59.09	
Raleigh	Stone Coal Junction	20.1	Mine run service. No change.										
Total Eastbound		168.6											
Grand Total Cost per Car													

Stone Coal Junction to Kenova via Gilbert

Stone Coal Junction	Peach Creek	80.0	D				6,863	93.0	10.0	8.00	$19.00	$152.00	
Peach Creek	Kenova	80.4	0.22				6,238	84.5	9.3	8.65	19.00	164.35	
Total Westbound		160.4											
Kenova	Peach Creek	80.4	0.57				1,741	84.5	11.6	6.93	$19.00	$131.67	
Peach Creek	Stone Coal Junction.	†80.0											
Total Eastbound		160.4											
Grand Total Cost per Car													

x-One third of westbound trains over new lines returning with eastbound Virginian empties will constitute one-half of the westbound Elmore-Peach Creek.
†-Return service charged one-third to Elmore-Peach Creek, two-thirds to Eastbound loads.
Cars 53.2 tons net, 73.8 tons gross.

Elmore to Kenova via Gilbert

From	To	Distance, miles	Rolling grade	Helpers: Number	Helpers: Miles	Helpers: Grade	Rating, gross tons	Number of cars	Train speed	Train hours	Cost per train hour	Total cost	Cost per car
	Peach Creek	70.8	D				6,863	93.0	10.0	7.08	$19.00	$134.52	$1.45
rek	Kenova	80.4	0.22				6,238	84.5	9.3	8.65	19.00	164.35	1.94
otal Westbound		151.2											$3.39
	Peach Creek	80.4	0.57				1,741	84.5	11.6	6.93	$19.00	$131.67	$1.56
reek	Elmore	70.8	0.80				1,916	93.0	10.0	x3.54	19.00	67.26	.72
otal Eastbound		151.2											$2.28
and Total Cost per Car													$5.67

Stone Coal Junction to Kenova via Raleigh

oal Junction	Raleigh	20.1	Mine run service. No change.										
	Quinnimont	14.6					3,225	43.7	4.7	3.11	$19.00	$59.09	$1.35
ont	Handley	50.9					3,630	50.0	10.3	4.94	19.00	93.86	1.88
	Kenova	83.0					5,885	79.8	8.9	9.33	19.00	177.27	2.22
otal Westbound		168.6											$5.45
	Handley	83.0	0.32				1,644	79.8	9.5	8.74	$19.00	$166.06	$2.08
	Quinnimont	50.9	No service required.										
ont	Raleigh	14.6	2.20				980	43.7	4.7	3.11	19.00	59.09	1.35
	Stone Coal Junction	20.1	Mine run service. No change.										
otal Eastbound		168.6											$3.43
and Total Cost per Car													$8.88

Stone Coal Junction to Kenova via Gilbert

oal Junction	Peach Creek	80.0	D				6,863	93.0	10.0	8.00	$19.00	$152.00	$1.63
reek	Kenova	80.4	0.22				6,238	84.5	9.3	8.65	19.00	164.35	1.94
otal Westbound		160.4											$3.57
	Peach Creek	80.4	0.57				1,741	84.5	11.6	6.93	$19.00	$131.67	$1.56
reek	Stone Coal Junction	80.0											
otal Eastbound		160.4											$1.56
and Total Cost per Car													$5.13

e third of westbound trains over new lines returning with eastbound Virginian empties will constitute one-half of the westbound Elmore-Peach Creek trains.
run service charged one-third to Elmore-Peach Creek, two-thirds to Eastbound loads.
53.2 tons net, 73.8 tons gross.

[fol. 214]

Peach Creek to Quinnimont via Barboursville

From	To	Distance, miles	Ruling grade	Helpers: Number	Helpers: Miles	Helpers: Grade	Rating, gross tons	Number of cars	Train speed	Train hours	Cost per train hour	Total cost	Co
Peach Creek	Handley	129.2	0.30				6,671	90.0	10.1	12.79	$19.00	$243.01	
Barboursville	St. Albans			1	30.0	0.30	6,671	90.0	7.5	4.00	17.00	68.00	
Handley	Quinnimont	50.9	0.40				4,186	56.7	8.3	6.13	19.00	116.47	
Total Eastbound		180.1											
Quinnimont	Handley	50.9	D				1,168	56.7	10.3	4.94	$19.00	$93.86	
Handley	Peach Creek	129.2	0.50				1,854	90.0	14.9	†1.24	19.00	23.56	
Barboursville	Peach Creek	(63.3)	0.50				1,854	90.0	11.6	x4.68	19.00	88.92	
Total Westbound		180.1											
Grand Total Cost per Car													

Peach Creek to Quinnimont via New Line

Peach Creek	Stone Coal Junction	80.0	0.80				3,000	40.7	10.0	8.00	$19.00	$152.00	
Stone Coal Junction	Raleigh	20.1	Mine run service. No change.										
Raleigh	Quinnimont	14.6	D				3,225	43.7	4.7	3.11	19.00	59.09	
Total Eastbound		114.7											
Quinnimont	Raleigh	14.6				4	900	43.7	4.7	3.11	$19.00	$59.09	
Raleigh	Stone Coal Junction	20.1	Mine run service. No change.										
Stone Coal Junction	Peach Creek	80.0	No return service required.										
Total Westbound		114.7											
Grand Total Cost per Car													

†-One-seventh of the Eastbound trains return to Peach Creek.
x-Six-sevenths of the Eastbound trains handle Westbound cars to Russell and Eastbound empty cars Russell to Peach Creek.
Cars 53.2 tons net, 73.8 tons gross.
D-Descending grade.

Peach Creek to Quinnimont via Barboursville

From	To	Distance miles	Ruling grade	Helpers: Number	Helpers: Miles	Helpers: Grade	Rating gross tons	Number of cars	Train speed	Train hours	Cost per train hour	Total cost	Cost per car
ek	Handley	129.2	0.30				6,671	90.0	10.1	12.79	$19.00	$243.01	$2.70
lle	St. Albans			1	30.0	0.30	6,671	90.0	7.5	4.00	17.00	68.00	.76
	Quinnimont	50.9	0.40				4,186	56.7	8.3	6.13	19.00	116.47	2.05
l Eastbound		180.1											$5.51
t	Handley	50.9	D				1,168	56.7	10.3	4.94	$19.00	$93.86	$1.66
	Peach Creek	129.2	0.50				1,854	90.0	14.9	†1.24	19.00	23.56	.26
lle	Peach Creek	(63.3)	0.50				1,854	90.0	11.6	x4.68	19.00	88.92	.99
l Westbound		180.1											$2.91
d Total Cost per Car													$8.42

Peach Creek to Quinnimont via New Line

k	Stone Coal Junction	80.0	0.80				3,000	40.7	10.0	8.00	$19.00	$152.00	$3.73
Junction	Raleigh	20.1	Mine run service. No change.										
	Quinnimont	14.6	D				3,225	43.7	4.7	3.11	19.00	59.09	1.35
l Eastbound		114.7											$5.08
	Raleigh	14.6		4			900	43.7	4.7	3.11	$19.00	$59.09	$1.35
	Stone Coal Junction	20.1	Mine run service. No change.										
Junction	Peach Creek	80.0	No return service required.										
Westbound		114.7											$1.35
l Total Cost per Car													$6.43

eventh of the Eastbound trains return to Peach Creek.
evenths of the Eastbound trains handle Westbound cars to Russell and Eastbound empty cars Russell to Peach Creek.
2 tons net, 73.8 tons gross.
nding grade.

Proposed Route:					
Via Gilbert	160.4	13	26,985	138,433.05	
Saving in cost via proposed route	....	....	.....	.....	$101,193.75
Peach Creek to Quinnimont					
Existing Route:					
Via Barboursville	180.1	$8.42	24,420	$205,616.40	
Proposed Route:					
Via Gilbert	114.7	6.43	24,420	157,020.60	
Saving in cost via proposed route	....	....	.....	.....	$48,595.80
Total savings via proposed routes	....	....	.....	.....	$501,466.11

(Here follows side folios 212, 213 and 214)

[fol. 215] Saving in Cost of Repairs, Depreciation and Retirements of Coal Cars Due to Movement of Loaded Cars via Shorter Routes Through Use of Proposed New Lines

	Number of cars	Distance hauled		Car miles saved
Elmore to Kenova:				
Via Matoaka	45,770	198.9	9,103,653	.....
Via Deepwater	10,788	151.9	1,638,697	.....
Total	56,558		10,742,350	
Via Gilbert	56,558	151.2	8,551,570	2,190,780
Stone Coal Junction to Kenova:				
Via Raleigh	26,985	168.6	4,549,671	.....
Via Gilbert	26,985	160.4	4,328,394	221,277
Peach Creek to Quinnimont:				
Via Barboursville	24,420	180.1	4,398,042	.....
Via Gilbert	24,420	114.7	2,800,974	1,597,068
Total car miles saved	.....	....	.....	4,009,125
Cost per car mile and repairs and depreciation	.....	....	.....	$0.015
Saving from use of new line	.....	....	.....	$60,136.88

[fol. 216] Saving in Time of Movement of Loaded and Empty Coal Cars Resulting from Routing Existing Coal Traffic Over Proposed New Line

Virginian Coal Traffic

	Time of movement (hours)	Days	Interest, taxes and insurance at 40 cents per day
Elmore—Kenova via Matoaka			
Elmore—Matoaka	2.50	....	....
At Matoaka	6.00	....	....
Matoaka—Bluestone	2.00	....	....
At Bluestone	6.00	....	....
Bluestone—Iaeger	4.68	....	....
At Iaeger	3.00	....	....
Iaeger—Williamson	4.38	....	....
At Williamson	5.00	....	....
Williamson—Kenova	7.39	....	....
Total for loaded movement	40.95	1.71	$0.68
Kenova—Williamson	6.16	....	....
At Williamson	5.00	....	....
Williamson—Iaeger	3.65	....	....
At Iaeger (see note)	1.50	....	....
Iaeger—Bluestone (see Note)	2.34	....	....
At Bluestone	6.00	....	....
Bluestone—Matoaka	2.00	....	....
At Matoaka	6.00	....	....
Matoaka—Elmore	2.50	....	....
Total for empty movement	35.15	1.46	$0.58
Total for loaded and empty movement	76.10	3.17	$1.26

NOTE.—It is assumed that one-half the cars for westbound movement are supplied by the Virginian and these identical cars returned to the Virginian via the same route and that the other one-half are supplied by Norfolk & Western, from the east at Bluestone and such cars returning from the west are used at Iaeger; therefore only one-half of movement time is taken (for the Virginian cars) Iaeger to Bluestone.

Elmore—Kenova via Deepwater

	Time of movement (Hours)	Days	Interest, taxes and insurance at 40 cents per day
Elmore—Jenny Gap	1.93	....	....
Jenny Gap—Page	4.59	....	....
At Page	6.00	....	....
Page—Deepwater	1.06	....	....
At Deepwater	6.00	....	....
Deepwater—Handley	1.04	....	....
At Handley	5.00	....	....
Handley—Kenova	9:33	....	....
Total for loaded movement	34.95	1.46	$0.58
Kenova—Handley	8.74	....	....
At Handley	5.00	....	....
Handley—Deepwater	1.04	....	....
At Deepwater	6.00	....	....
Deepwater—Page	1.06	....	....
At Page (see Note)	3.00	....	....
Page—Elmore (see Note)	3.26	....	....
Total for empty movement	28.10	1.17	$0.47
Total for loaded and empty movement	63.05	2.63	$1.05

NOTE.—Assuming that one-half of these cars are supplied by Chesapeake & Ohio only such C. & O. cars would move beyond Page; the Virginian cars would be used at Page.

[fol. 217] Saving in Time of Movement of Loaded and Empty Coal Cars Resulting from Routing Existing Coal Traffic Over Proposed New Line

Virginian Coal Traffic

Elmore—Kenovia via Gilbert

Elmore—Peach Creek	7.08	....	....
At Peach Creek	5.00	....	....
Peach Creek—Kenova	8.65	....	....
Total for loaded movement	20.73	0.86	$0.34
Kenova—Peach Creek	6.93	....	....
At Peach Creek—½ (See Note 1)	2.50	....	....
Peach Creek—Elmore—½ (See Note 1)	3.54	....	....
Quinnimont—Raleigh—½ (See Note 2)	1.56	....	....
At Raleigh—½ (See Note 2)	3.00	....	....
Raleigh—Pemberton—½ (See Note 2)	1.00	....	....
Total for empty movement	18.53	0.77	$0 31
Total loaded and empty movement	39.26	1.63	$0.65

NOTE 1.—It is assumed that one-half of the empty cars for this movement will be supplied by the Virginian and these cars will move empty Peach Creek to Elmore.

NOTE 2.—It is assumed that the other one-half of the empty cars will be supplied by Chesapeake & Ohio thru Quinnimont, Raleigh and Pemberton and used by the Virginian in Sections 13, 14 and 15, thereby saving up-hill haul by mine run crews from Elmore to Stone Coal Junction and with respect to Section 13 all the way to Pemberton.

Summary for Virginian Traffic

	Total interest, taxes and insurance	Savings
Existing Routes		
Elmore—Kenova via Matoaka—45,779 cars at $1.25	$57,670.20	
Elmore—Kenova via Deepwater—10,788 cars at $1.05	11,327.40	
Total for existing routes	$68,997.60	
Proposed Route		
Elmore—Kenova via Gilbert—56,558 cars at $0.65	$36,762.70	
Total for proposed route	$36,762.70	
Difference-saving		$32,234.90

[fol. 218] Saving in Time of Loaded and Empty Coal Cars Resulting from Routing Existing Coal Traffic Over Proposed New Line

Chesapeake and Ohio Coal Traffic

	Time of movement (hours)	Days	Interest, taxes and insurance at 40 cents per day
Stone Coal Junction—Kenova via Raleigh			
Stone Coal Junction—Raleigh	4.00	....	....
At Raleigh	6.00	....	....
Raleigh—Quinnimont	3.11	....	....
At Quinnimont	6.00	....	....
Quinnimont—Handley	4.94	....	....
At Handley	5.00	....	....
Handley—Kenova	9.33	....	....
Total loaded movement	38.38	1.60	$0.64

Note.—Movement of empty cars would be the same as at present.

Stone Coal Junction—Kenova via Gilbert			
Stone Coal Junction—Peach Creek	8.00	....	....
At Peach Creek	5.00	....	....
Peach Creek—Kenova	8.65	....	....
Total loaded movement	21.65	.90	$0.36

Note.—Movement of empty cars would be the same as at present.

Peach Creek—Quinnimont via Barboursville			
Peach Creek—Handley	12.79	....	....
At Handley	5.00	....	....
Handley—Quinnimont	6.13	....	....
Total loaded movement	23.92	1.00	$0.40

Note.—Movement of empty cars would be the same as at present.

Peach Creek—Quinnimont via Gilbert			
Peach Creek—Stone Coal Junction	8.00	....	....
At Stone Coal Junction	6.00	....	....
Stone Coal Junction—Raleigh	4.00	....	....
At Raleigh	6.00	....	....
Raleigh—Quinnimont	3.11	....	....
Total loaded movement	27.11	1.13	$0.45

Note.—Movement of empty cars would be the same as at present.

Summary for Chesapeake and Ohio Coal Traffic

Existing Routes

	Total interest taxes and insurance	Savings
Stone Coal Junction—Kenova via Raleigh, 26,985 cars at $0.64	$17,270.40	
Peach Creek—Quinnimont via Barboursville, 24,420 cars at $0.40	9,768.00	
Total for existing routes	$27,038.40	

Proposed Routes

Stone Coal Junction—Kenova via Gilbert, 26,985 cars at $0.36	$9,714.60	
Peach Creek—Quinnimont via Gilbert, 24,420 cars at $0.45	10,989.00	
Total for proposed routes	$20,703.60	
Difference—saving		$6,334.80

[86 I.C.C. 219] The Chesapeake and Ohio Railway Company

Estimated Cost per Train Hour Based Upon Operating Performance for the First Seven Months of 1927

	Hinton division	Logan division	Huntington division	System
Cost per Train Hour:				
Wages and Train Supplies	$8.393	$8.718	$7.423	$7.835
Other Expenses	10.671	9.433	9.913	11.266
Total	$18.974	$18.151	$17.346	$19.101
Ratio of Locomotive Miles to Train Miles	1.275	1.107	1.109	1.121
Cost per Train Hour less Proportionate Cost of Helper and Light Mileage:				
Wages and Train Supplies	$6.512	$7.875	$6.757	$6.989
Other Expenses	8.369	8.521	9.012	10.050
Total	$14.881	$16.396	$15.769	$17.039
Average Tractive Power of Locomotives in Service	61,167	64,791	62,455	62,537
Proportionate Cost for Locomotive of 74,200 Pounds Tractive Power:				
Wages and Train Supplies	$*6.512	$*7.875	$*6.757	$*6.989
Other Expenses	10.152	9.757	10.706	11.919
Total	$16.664	$17.632	$17.463	$18.908
Add interest on value of Locomotive	1.989	1.989	1.989	1.989
Total	$18.653	$19.621	$19.452	$20.897

* Not proportionate to tractive power.

Computation of Interest

Train Hours System	741,067
Ratio of Locomotive Miles to Train Miles	1.121
Locomotive Hours Estimated	822,978
Number of Locomotives Assigned to Freight Service including Shopped and Stored	658
Hours per Locomotive Assigned	1,306
Value of Locomotive of 24,000 Pounds Tractive Power	$74,200
Interest at 6 per cent per annum	$4,452
Interest for System Minutes	$2,597
Interest for Locomotive Hour	$1.949

[fol. 220]

The Chesapeake and Ohio Railway Company

Freight Train and Engine Expenses

Seven Months Ended July 31, 1927

System	Expense	Cost per train mile	Cost per loco. mile	Cost per train hour	Cost per 1,000 gross ton miles	Cost per 1,000 net ton miles
Locomotive Repairs	$4,384,819	$.527	$.470	$5.901	$.196	$.364
Locomotive Depreciation	889,336	.107	.095	1.197	.040	.074
Train Enginemen	2,400,080	.289	.258	3.242	.108	.200
Fuel for Locomotives	2,102,495	.253	.225	2.829	.094	.174
Water for Locomotives	209,408	.025	.023	.282	.009	.017
Lubricants for Locomotives	89,321	.011	.010	.121	.004	.007
Other Supplies for Locomotives	48,778	.006	.005	.066	.002	.004
Engine House Expenses	646,578	.078	.069	.870	.029	.054
Trainmen	2,773,328	.333	.297	3.732	.124	.230
Train Supplies and Expenses	640,110	.077	.069	.861	.029	.053
Total	$14,193,313	$1.706	$1.521	$19.101	$.635	$1.177

Train Miles	8,321,826
Locomotive Miles	9,330,069
Train Hours	743,067
Gross Ton Miles (1,000)	22,350,111
Net Ton Miles (1,000)	12,061,678

The Chesapeake and Ohio Railway Company—Continued

Freight Train and Engine Expenses

Seven Months Ended July 31, 1927

Huntington Division	Expense	Cost per train mile	Cost per loco. mile	Cost per train hour	Cost per 1,000 gross ton miles	Cost per 1,000 net ton miles
Locomotive Repairs	$[illegible]	$.623	$.506	$5.385	$.219	$.586
Locomotive Depreciation	143,188	.123	.112	1.056	.043	.077
Train Enginemen	413,228	.356	.323	3.050	.126	.220
Fuel for Locomotives	287,628	.248	.225	2.123	.087	.154
Water for Locomotives	37,852	.033	.030	.279	.012	.020
Lubricants for Locomotives	12,069	.011	.010	.094	.004	.007
Other Supplies for Locomotives	7,345	.006	.006	.054	.002	.004
Engine House Expenses	131,093	.113	.103	.972	.040	.070
Trainmen	508,776	.438	.398	3.754	.155	.272
Train Supplies and Expenses	85,255	.073	.067	.629	.026	.046
Total	$2,350,556	$2.024	$1.840	$17.346	$.714	$1.256

Train Miles	1,161,104
Locomotive Miles	1,277,522
Train Hours	135,507
Gross Ton Miles (1,000)	3,292,829
Net Ton Miles (1,000)	1,871,386

The Chesapeake and Ohio Railway Company—Continued

Freight Train and Engine Expenses

Seven Months Ended July 31, 1927

Logan Division	Expense	Cost per train mile	Cost per loco. mile	Cost per train hour	Cost per 1,000 gross ton miles	Cost per 1,000 net ton miles
Locomotive Repairs	$332,114	$.626	$.566	$5.036	$.193	$.347
Locomotive Depreciation	53,959	.102	.092	.818	.031	.056
Train Enginemen	233,531	.440	.397	3.540	.136	.244
Fuel for Locomotives	184,904	.349	.315	2.804	.107	.193
Water for Locomotives	8,140	.015	.014	.124	.005	.009
Lubricants for Locomotives	6,142	.012	.010	.093	.004	.007
Other Supplies for Locomotives	3,207	.006	.006	.049	.002	.003
Engine House Expenses	33,558	.063	.057	.509	.020	.035
Trainmen	295,382	.556	.503	4.479	.172	.309
Train Supplies and Expenses	46,068	.087	.078	.699	.027	.048
Total	$1,197,005	$2.256	$2.038	$18.151	$.697	$1.251

Train Miles	530,606
Locomotive Miles	587,248
Train Hours	65,948
Gross Ton Miles (1,000)	1,718,004
Net Ton Miles (1,000)	957,142

The Chesapeake and Ohio Railway Company—Continued

Freight and Engine Expenses

Seven Months Ended July 31, 1927

Hinton Division

	Expense	Cost per train mile	Cost per loco. mile	Cost per train hour	Cost per 1,000 gross ton miles	Cost per 1,000 net ton miles
Locomotive Repairs	$547,198	$.801	$.628	$5.974	$.369	$.644
Locomotive Depreciation	90,704	.133	.104	.990	.061	.106
Train Enginemen	358,542	.525	.412	3.915	.242	.422
Fuel for Locomotives	224,952	.329	.258	2.456	.152	.265
Water for Locomotives	12,590	.018	.015	.138	.009	.015
Lubricants for Locomotives	7,925	.012	.009	.087	.005	.009
Other Supplies for Locomotives	5,653	.008	.006	.061	.004	.007
Engine House Expenses	88,372	.129	.101	.965	.060	.104
Trainmen	361,481	.529	.415	3.947	.244	.425
Train Supplies and Expenses	40,419	.059	.046	.441	.027	.048
Total	$1,737,836	$2.543	$1.994	$18.974	$1.173	$2.045

Train Miles	683,469
Locomotive Miles	871,531
Train Hours	91,592
Gross Ton Miles (1,000)	1,481,576
Net Ton Miles (1,000)	849,989

[fol. 222]

The Chesapeake and Ohio Railway Company

Freight Train and Engine Expenses

Year 1926

System	Expense	Cost per train mile	Cost per loco. mile	Cost per train hour	Cost per 1,000 gross ton miles	Cost per 1,000 net ton miles
Locomotive Repairs	$7,536,569	$.510	$.461	$5.440	$.196	$.359
Locomotive Depreciation	1,483,914	.100	.090	1.071	.038	.071
Train Enginemen	4,324,267	.293	.265	3.121	.112	.206
Fuel for Locomotives	3,815,580	.258	.234	2.754	.099	.182
Water for Locomotives	367,947	.025	.023	.266	.010	.018
Lubricants for Locomotives	131,891	.009	.008	.095	.003	.006
Other Supplies for Locomotives	88,455	.006	.005	.064	.002	.004
Engine House Expenses	1,070,677	.073	.066	.773	.029	.051
Trainmen	4,775,827	.323	.293	3.447	.124	.228
Train Supplies and Expenses	1,094,265	.074	.067	.790	.028	.052
Total	$24,689,392	$1.671	$1.512	$17.821	$.641	$1.177

Train Miles	14,772,692
Locomotive Miles	16,326,785
Train Hours	1,385,416
Gross Ton Miles (1,000)	38,500,793
Net Ton Miles (1,000)	20,968,059

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The Chesapeake and Ohio Railway Company—Continued

Freight Train and Engine Expenses

Year 1926

Huntington Division

	Expense	Cost per train mile	Cost per loco. mile	Cost per train hour	Cost per 1,000 gross ton miles	Cost per 1,000 net ton miles
Locomotive Repairs	$1,215,972	$.621	$.566	$5.138	$.231	$.401
Locomotive Depreciation	237,445	.121	.111	1.003	.045	.078
Train Enginemen	727,743	.370	.339	3.075	.138	.240
Fuel for Locomotives	514,452	.263	.240	2.174	.098	.170
Water for Locomotives	80,496	.041	.037	.340	.015	.027
Lubricants for Locomotives	18,727	.010	.009	.079	.004	.006
Other Supplies for Locomotives	13,501	.007	.006	.057	.003	.004
Engine House Expenses	217,803	.111	.102	.921	.040	.072
Trainmen	876,977	.448	.408	3.706	.166	.290
Train Supplies and Expenses	138,464	.071	.064	.585	.026	.046
Total	$4,041,580	$2.063	$1.882	$17.078	$.766	$1.334

Train Miles	1,959,228
Locomotive Miles	2,147,253
Train Hours	236,661
Gross Ton Miles (1,000)	5,272,926
Net Ton Miles (1,000)	3,028,841

[fol. 223]

The Chesapeake and Ohio Railway Company—Continued

Freight Train and Engine Expenses

Year 1926

Local Division	Expense	Cost per train mile	Cost per loco. mile	Cost per train hour	Cost per 1,000 gross ton miles	Cost per 1,000 net ton miles
Locomotive Repairs	$747,856	$.819	$.728	$6.465	$.271	$.486
Locomotive Depreciation	86,110	.094	.084	.744	.032	.056
Train Enginemen	405,489	.444	.395	3.505	.147	.263
Fuel for Locomotives	322,853	.352	.315	2.791	.117	.210
Water for Locomotives	18,661	.020	.018	.161	.007	.011
Lubricants for Locomotives	9,044	.010	.009	.078	.003	.006
Other Supplies for Locomotives	6,017	.007	.006	.052	.002	.004
Engine House Expenses	60,006	.066	.058	.519	.022	.039
Trainmen	482,087	.528	.469	4.167	.175	.313
Train Supplies and Expenses	74,788	.083	.073	.646	.027	.049
Total	$2,212,911	$2.423	$2.155	$19.128	$.803	$1.437

Train Miles	913,306
Locomotive Miles	1,026,839
Train Hours	115,687
Gross Ton Miles (1,000)	2,754,512
Net Ton Miles (1,000)	1,540,275

The Chesapeake and Ohio Railway Company—Continued

Freight and Engine Expenses

Year 1926

Hinton Division	Expense	Cost per train mile	Cost per loco. mile	Cost per train hour	Cost per 1,000 gross ton miles	Cost per 1,000 net ton miles
Locomotive Repairs	$1,013,268	$.730	$.639	$5.592	$.356	$.617
Locomotive Depreciation	144,882	.104	.092	.800	.051	.088
Train Enginemen	638,869	.460	.403	3.525	.224	.389
Fuel for Locomotives	419,660	.302	.265	2.316	.147	.256
Water for Locomotives	28,829	.022	.018	.159	.010	.018
Lubricants for Locomotives	10,217	.007	.006	.056	.004	.006
Other Supplies for Locomotives	7,979	.006	.005	.044	.003	.005
Engine House Expenses	140,766	.102	.089	.777	.049	.086
Trainmen	643,198	.464	.406	3.549	.226	.393
Train Supplies and Expenses	72,664	.052	.046	.401	.025	.044
Total	$3,120,332	$2.249	$1.969	$17.219	$1.095	$1.902

Train Miles	1,387,590
Locomotive Miles	1,584,634
Train Hours	181,213
Gross Ton Miles (1,000)	2,848,466
Net Ton Miles (1,000)	1,640,721

[fol. 224]

Locomotive Data

The Chesapeake and Ohio Railway Company

Year	No. of locomotives (Steam)	Repairs	Depreciation	Retirements	Total	Average cost per annum	Total tractive power (pounds)	Average tractive power (pounds)
1921.....	946	$6,119,930	$492,448	$1,998	$6,614,376	$6,992	43,852,169	46,355
1922.....	943	6,236,489	516,230	8,870	6,743,849	7,151	43,791,146	46,438
1923.....	931	7,965,708	531,883	277,943	8,775,234	9,426	44,765,338	48,083
1924.....	1,005	9,562,831	852,111	283,527	10,698,469	10,645	52,287,303	52,027
1925.....	995	11,425,962	1,306,329	187,135	12,919,426	12,984	52,649,867	52,914
1926.....	1,049	10,720,970	1,483,914	41,677	12,246,561	11,675	57,613,105	54,922

Norfolk and Western Railway Company

1921.....	1,063	$6,432,471	$915,560	$813	$7,348,844	$6,913	52,910,250	49,775
1922.....	1,058	9,154,638	788,511	2,503	9,945,652	9,400	52,695,584	49,807
1923.....	1,029	10,063,210	850,396	65,882	10,979,488	10,670	54,817,633	53,273
1924.....	1,013	10,429,445	896,275	90,007	11,415,727	11,269	54,654,416	53,953
1925.....	993	9,616,848	912,611	64,500	10,593,959	10,669	54,017,482	54,398
1926.....	925	9,558,392	922,547	169,122	10,650,061	11,514	53,280,528	57,601

Virginian Railway Company

1921.....	145	$1,685,342	$114,251	.....	$1,799,593	$12,411	10,045,000	69,275
1922.....	146	1,617,696	114,108	$8,443	1,740,247	11,920	10,160,000	69,589
1923.....	161	2,201,977	121,539	1,874	2,325,390	14,443	11,678,750	72,539
1924.....	161	2,037,919	139,656	.....	2,177,575	13,525	11,678,750	72,539
1925.....	161	1,892,417	13,549	.....	2,031,966	12,621	11,683,100	72,566
1926.....	161	1,711,102	139,638	2	1,850,742	11,495	11,683,100	72,566

Freight Car Data

The Chesapeake and Ohio Railway Company

Year	No. of freight cars	Repairs	Depreciation	Retirements	Total	Average cost per annum	No. freight car miles (thousands)	Average cost per freight car mile
1921	51,281	$9,417,667	$1,427,093	$137,386	$10,982,146	$214	423,957	$.026
1922	52,000	11,575,991	1,550,403	173,707	13,300,101	256	431,451	.031
1923	50,845	11,741,604	1,608,762	3,533,243	16,883,609	332	565,305	.030
1924	51,988	10,636,066	2,323,079	2,649,459	15,608,604	300	653,525	.024
1925	56,551	9,673,906	3,499,804	720,174	13,893,884	246	779,115	.018
1926	54,851	10,053,967	3,522,833	453,696	14,030,496	256	856,492	.016
			Norfolk and Western Railway Company					
1921	46,254	$7,240,225	$1,698,538	$388,373	$9,327,136	$202	387,994	$.024
1922	47,461	8,015,645	1,563,316	1,119,013	10,697,974	225	462,561	.023
1923	41,142	5,790,826	1,771,068	3,466,334	11,028,228	268	481,708	.023
1924	42,171	4,336,308	1,828,649	1,712,844	7,877,801	187	498,934	.016
1925	45,916	4,938,350	2,261,333	563,258	7,762,941	169	565,572	.014
1926	45,750	4,464,551	2,286,014	103,261	6,853,826	150	662,550	.010
			Virginian Railway Company					
1921	9,804	$1,374,342	$329,405	$13,662	$1,717,409	$175	80,313	$.021
1922	9,676	2,313,297	335,248	60,656	2,709,201	280	88,667	.031
1923	9,204	2,164,209	325,999	110,856	2,601,064	283	104,557	.025
1924	10,308	1,038,254	435,335	7,953	1,481,542	144	86,575	.017
1925	10,289	1,214,720	445,900	7,105	1,667,725	162	83,077	.020
1926	10,280	1,455,502	446,738	1,589	1,903,829	185	101,152	.019

NOTE—Italics denote red figures.

[fol. 224½] The witness further testified:

The following explanation may be necessary to an understanding of this exhibit:

The statements in this exhibit are designed to show the savings from diversion of existing coal traffic from existing routes to the new route formed by construction of the proposed extensions. The savings are divided into three classes as follows:

1—Train service costs.
2—Repairs and depreciation of coal cars.
3—Interest, taxes and insurance on coal cars.

Page 1 shows at the top the amount of the savings of each class and the total of all classes aggregating $600,172.69. The table in the lower part of page 1 is a summary of the train service costs and the amount of savings in this class. The numbers of cars available for diversion from each of the existing routes to the proposed route are taken from page 1 of Exhibit No. 26. The unit costs per car are carried forward from other statements in this exhibit which I am now describing.

Dealing first with the details of train service costs; page 2 of this exhibit shows the train service costs via the existing routes Elmore to Kenova via Matoaka and Elmore to Kenova via Deepwater. Elmore is the assembling yard for Virginian coal traffic through which passes all of the coal which moves via Matoaka and all of the coal via the Deepwater route which is considered subject to diversion over the new line.

Kenova is taken as the common point in the west through which all westbound coal must pass because it is the point at which the main lines of the Norfolk and the Chesapeake cross each other.

[fol. 225] In these tables and the following similar tables on pages 3 and 4 the first two columns show the temini of train runs and helper districts, the third column shows the distance and the fourth column the ruling grades. The distances and grades are taken from the chart and profiles heretofore made a part of the record herein. The fifth, sixth and seventh columns from the left show the number of helper engines, the round trip mileage for such helpers

between the points shown in colmns 1 and 2 and the helper grades. In that connection, I want to say that on page 2 the mileage shown for helpers between Elmore and Clarks Gap and between Elmore and Jenny Gap is the one-way distance and not the round-trip mileage, and that on page 4 the mileage shown for helpers between Barboursville and St. Albans is the round-trip mileage.

Column 5 shows the rating in gross tons over the ruling grades and with helpers over the helper grades. These ratings are taken, except as noted, from actual performance records on the Chesapeake but as to portions of the Virginian and the Norfolk and the new line are developed by the use of a formula unless otherwise stated. The formula used is per cent of grade multiplied by 20, plus 6 pounds per ton for train resistance, divided into the tractive power of the locomotive and from this quotient deduct the weight of the engine. I have found from experience that this is a good formula for practical purposes in handling loaded coal cars and it produces a result which checks closely with the Virginian rating for steam locomotives between Elmore and Princeton. On grades of less than .5 per cent, however, other conditions sometimes affect practical train loads.

Column 8 shows the number of cars in train based on the rating and the average gross weight per car of 73.8 tons. Column 10 shows the train speed taken from actual performance where available and otherwise estimated from such actual data.

Column 11 shows the train hours involved and is obtained by dividing the distance (shown in column 3) by the speed [fol. 226] (shown in column 10); and column 12 shows the cost per train hour taken from actual experience of the Chesapeake as shown at pages 9 to 13 of this exhibit.

Column 13 shows total cost and is obtained by multiplying the train hours in column 10 by the unit cost in column 12.

Column 14 shows average cost per car obtained by dividing the total cost in column 13 by the number of cars in column 9.

Before discussing the detailed tables on pages 2 to 4 showing the estimated direct train service costs by the several routes shown on those pages, I wish to call attention to

pages 9 to 13, inclusive, of this exhibit, upon which are based the cost per train hour which I have used. I should explain that the movement of westbound coal from the New River District is at the present time and after the construction of the proposed extensions will be over portions of the Hinton, Huntington and Logan divisions. The Hinton Division main line extends from Hinton to Handley, West Virginia, and that division includes the Loup Creek, Piney Creek and Winding Gulf branches, which serve the New River Coal District. The Huntington Division main line extends from Handley, West Virginia, to Russell, Kentucky, and that division includes the Cabin Creek and Paint Creek Branches and the Coal River Subdivision serving generally the mines in the Kanawha and Coal River Districts. The Logan Division sometimes referred to as the Logan Subdivision extends from Barboursville to Gilbert and includes all of the branches of that line. The costs of operation on those divisions are reasonably representative of the costs applicable to the particular service involved in transporting coal from the New River District over the alternative routes here involved. The accounting records currently made by the Cheapeake show a separation of the operating expenses first as between divisions and second as between freight and passenger service on each division. The direct [fol. 227] train service costs, embracing the accounts named in the several tables on pages 10 to 13, inclusive, are directly allocated as between passenger and freight service, with the exception of water for locomotives and enginehouse expenses, which are apportioned on the basis prescribed by the Interstate Commerce Commission. The expenses allocated to freight service cover all classes of freight service, including mine runs, local freights, manifest trains and slow freight trains. All of the three divisions mentioned have all of these classes of service, but the predominating service is through coal trains, such as move the business under consideration here.

I want to amend that last statement by saying that the Logan Division has no manifest service.

The expenses for the year 1926 for these three divisions and for the system are shown on pages 12 and 13, the system figures being given for comparison. The tables also show the units of service performed; that is, the number of train

miles, locomotive miles and train hours and the quantity of freight business moved express in gross ton miles and in net ton miles. The expenses in each account and the total expenses on each division are divided by the units of service and by the units of business moved to produce the average costs by accounts and totals. Pages 10 and 11 show for the seven months ended July 31, 1927, the same information that is shown on pages 12 and 13 for the year 1926.

The costs per train hour for the three divisions and for the system for the first seven months of 1927 are carried forward to page 9, which is a summary sheet. The first line, Wages and Train Supplies, includes the accounts Train Enginemen, Trainmen and Train Supplies and Ex-
[fol. 228] penses, and the second line Other Expenses includes all of the other accounts shown in the detailed statements.

The expenses shown in the detailed tables, lines 1, 2 and 3 of the summary on page 9, include the cost of helper engines and light engines in varying amounts on the three divisions, and in order to eliminate these costs, the total cost per train hour on each division and the system has been divided by the ratio of locomotive miles to train miles shown in line four. The resulting figures, representing the cost of single engine trains, are shown in the lines 5, 6 and 7. The next line shows the average tractive power of the locomotives in service on the three divisions and the system. The cost per train hour, as shown in the seventh line, is multiplied by the ratio of the average tractive power to 74,200 pounds, which is the tractive power of the Chesapeake h-4 type Mallet, which the Chesapeake would use over such of the alternative routes as it would operate and is using over such parts of those routes as are now in operation. Since the effect of tractive power is almost wholly confined to the item of other expenses, I have not applied this ratio to the item of wages and train supplies. To the total expenses developed in this way, I have added interest on the value of the locomotives and the computation of interest is shown in the table at the bottom of this page 9.
[fol. 229] Taking up now the cost estimates of train service by the alternative routes shown on pages 2 to 4 of the exhibit, I will not undertake to discuss each item in these

statements, but only those which require some explanation in order to make clear the source of the date used. The gross ratings in tons per train which I shall hereafter call simply "rating," between Elmore and Matoaka and between Matoaka and Bluestone are based on the formula stated. Between Bluestone and Iaeger I have assumed that the westbound coal from the Virginian goes forward in about the same order that it arrives at Clift Yard in 54 car trains because the traffic on the main line of the Norfolk is much heavier eastbound than it is westbound and in addition to this the grade against the eastbound traffic is from 1.2 to 2 per cent, both of which necessitate the movement of motive power and crews westbound to move eastbound traffic. From Iaeger to Williamson, the grade being descending, I have used 100 car trains. From Williamson to Kenova the rating is the same as the actual performance on the Chesapeake from Peach Creek to Kenova. Between Iaeger and Bluestone the return service is charged to the eastbound traffic.

In the movement from Elmore to Kenova via Deepwater the ratings Elmore to Jenny Gap and Jenny Gap to Page are based upon the formula stated and the rating from Handley to Kenova is in accord with that formula for a .3 per cent grade without a helper. The eastbound movement on the Virginian between Page and Elmore is very much heavier than the westbound movement and in addition to this the grades against the eastbound movement are steeper than those encountered in the westbound movement and inasmuch as empty cars returning from the west can be placed for loading in the vicinity of Page no eastbound service is required between Page and Elmore.

On the next sheet, page 3, at the top of the page, is the estimate of the cost from Elmore to Kenova via Gilbert. The rating from Elmore to Peach Creek is the estimated gross weight of 93 cars. This average of 93 cars is based [fol. 230] upon the number of cars to be moved as already explained, it being apparent that three westbound trains will be required to move that number of cars. The rating from Peach Creek to Kenova is the actual average train load on this district for 12 months ended August, 1927. I have also used the actual train speed in both directions on this district. I want to call attention to the footnote ex-

plaining the reason for using one-half of the computed train hours for the eastbound movement Peach Creek to Elmore.

Referring to the statement on page 3 covering the service from Stone Coal Junction to Kenova via Raleigh, the territory between Stone Coal Junction and Raleigh is operated by mine run crews which take the empty cars from Raleigh, place them at the mines and at Stone Coal Junction for delivery by the Virginian crews to mines on the Stone Coal Branch, do the switching at the mines, pick up the loads from the Stone Coal Branch and at the mines en route on Winding Gulf Branch and take all of the loaded cars both eastbound and westbound into Raleigh. Under the proposed plan of operation, this service will not be changed, nor will the average cost thereof be affected as these crews will move from Stone Coal Junction an average of 81 or 82 eastboard loads coming from the Logan District instead of an average of about 90 westbound loads which will be diverted over the proposed extensions. The rating between Raleigh and Quinnimont is based upon the average number of cars handled by trains operating between these points. The rating between Quinnimont and Handley is based upon an average movement of 50 cars as the business moves forward from Quinnimont about in the order that it arrives there. The eastbound traffic between Handley and Hinton is much heavier than the westbound traffic between these points, and, in addition, the grade is against the eastbound movement, so that westbound trains are available to move this business from Quinnimont to Handley and no return service is required. The factors affecting the movement Handley to Kenova are the same as via the Deepwater route.

[fol. 231] The movement from Stone Coal Junction to Kenova via Gilbert is based upon the same factors as from Elmore to Kenova except than no eastbound service is charged from Peach Creek to Stone Coal Junction inasmuch as all empties will be supplied from the east through Pemberton and the returning motive power and crews are used for handling eastbound business from the Logan Districts as will appear on the next following statement.

Referring now to page 4 of the exhibit, the statement showing the movement from Peach Creek to Quinnimont

via Barboursville. The train ratings and train speeds used are the actual ratings and speeds on these districts of the Chesapeake. The return movement is based upon the actual performance; that is one-seventh of the eastbound trains return to Peach Creek from Handley and the other six-sevenths move westbound cars from Handley to Russell, and then the power and crews run out of Russell with empty cars to Peach Creek. The cost of the service is based upon this method of operation.

From Peach Creek to Quinnimont via the new line the rating is based upon the formula already mentioned. No service is required between Stone Coal Junction and Raleigh, for the reasons explained and the rating from Raleigh to Quinnimont is the same as that used in the route Stone Coal Junction to Kenova via Raleigh. No return service is required Stone Coal Junction to Peach Creek because the motive power and crews moving west over the new line are charged to the westbound business.

The costs per car via each route as developed in these detailed statements are carried over to the summary on page 1 and there applied to the number of cars to be moved over the proposed route and diverted from each of the existing routes.

The second class of saving in transportation costs is the moving in maintenance of coal cars due to reduction in the distance hauled. In the statement on page 5, the num- [fol. 232] ber of cars via each route is multiplied by the miles hauled resulting in a saving of 4,009,125 car miles. The average cost for repairs and depreciation per car mile is shown on page 14 for the Chesapeake, Norfolk, and Virginian. I have used a figure of 1.5 cents as being representative of the costs there shown.

The third class of saving in transportation cost is interest, taxes and insurance on coal cars. I have found from experience that this amounts to about 40 cents per day, assuming an average movement of about 40 miles per car per day. In other words, the maintenance of cars runs about 1.5 cents per mile, and the other costs of ownership about 1 cent per mile making a total of 2.5 cents per mile, which, on a 40 mile basis, results in a per diem charge

of $1.00 per day. In the detailed statements on pages 6, 7 and 8, the average time of movement is computed for the several routes shown on those pages. The time between terminals corresponds to the train hours as worked out in the train cost statements. The time as terminals is based upon two studies, one of which developed the average time of movement through the Chesapeake's yards at Handley and Peach Creek, showing an average of about five hours and the other developed the average time of movement between Stone Coal Junction and Russell yard on the Chesapeake which worked out 38 hours during the month of September, 1927. This gave a check of the terminal times assumed at Raleigh and Quinnimont. I used the same figure for yard time at Matoaka, Bluestone, Page and Deepwater as at Raleigh and Quinnimont, and the same figure at Williamson as at Handley and Peach Creek. Some allowances have been made for elimination of empty car hauls due to cross haul of loads, such, for example, as between Iaegar and Bluestone on the Norfolk, between Page and Elmore on the Virginian and between Elmore and Peach Creek over the new line. These savings are summarized for the Virginian traffic and the Chesapeake traffic separately at the bottom of pages 7 and 8 of the exhibit.

The total amount of savings which will result from the use of the proposed extensions for diversion of existing [fol. 233] coal traffic of the Virginian and the Chesapeake from existing routes according to the plan of operation I have described is $600,172.69 as shown by the summary, which is page 1 of Exhibit No. 27. This does not include certain incidental savings, such as those which will accrue to the Virginian by reason of receiving a substantial part of its empty car supply from the Chesapeake at Pemberton where such cars can be immediately used at mines in that vicinity, instead of hauling such empty cars as it does at present from Elmore to Pemberton. The train service costs used represent only the direct costs, no allowance being made for certain overhead expenses which will be affected to some extent by the change in routing.

I have not included the maintenance and taxes on the new line as an element of cost in handling the diverted traffic over the proposed extensions.

The Chesapeake could not make effective the plan of operation which I have described and secure the total amount of the savings to which I have testified without, first, the cooperation of the Virginian in affording a connection at Itmann and in establishing through rates and divisions via that junction to the West, and, second, the operation of through train service between Elmore yard on the Virginian and Peach Creek yard on the Chesapeake. Any other method of handling through business between these yards, involving interchange at an intermediate point, would be more expensive than the plan proposed.

The Virginian cannot carry out the purposes contemplated in its application without making certain cooperative arrangements. It would be necessary for the Virginian to make connection with the Chesapeake at Gilbert and establish through rates and divisions both westbound and eastbound, including westbound rates via Stone Coal Junction and Gilbert for Chesapeake coal traffic with respect to which the Virginian would be an intermediate carrier between two parts of the Chesapeake. Moreover the [fol. 234] Virginian could not operate trains between Elmore yard and Peach Creek, the most economical arrangement, without running over the Chesapeake's tracks between Gilbert and Peach Creek nor could it effect interchange at Gilbert without providing interchange facilities, the cost of which it estimates at $500,000. The one thing the Virginian can do without cooperative arrangements of the things which it proposes is to develop the territory adjacent to the proposed line for eastbound business only; it could not develop this territory for westbound business—and the major portion of the business will move west—without a westbound outlet and joint rates and divisions thereover.

The Norfolk cannot carry out the purposes contemplated in its amended application by constructing the entire line from Elmore to Wharncliffe without making cooperative arrangements. As to westbound business originating on the Virginian, it would be necessary to make connection with the Virginian at Elmore Yard or at Itmann and to obtain interchange facilities either by agreement or by construction and to establish through rates and divisions via that route.

The Norfolk could not use such as line as a part of a through route for its own business, first because it would not connect with the Norfolk System at the east end and, second, because even if as suggested, but not proposed, in the amended application, a connection should be constructed up Pinnacle Creek or elsewhere, there is no business originating on the Norfolk moving in either direction that could be economically handled over the proposed line.

As to local business originating on the proposed line, construction by the Norfolk of the entire line from Wharncliffe to Elmore would produce only a branch line connecting at only one end with the Norfolk System. In that situation, and in the absence of cooperative arrangements with another carrier, eastbound coal from the mines on the new line would necessarily be hauled down the Guyandot River to Gilbert, thence over the mountain to Wharncliffe [fol. 235] and eastward along the Norfolk's main line on Tug Fork to Bluefield, more than seventy miles further than the direct line.

The Virginian could not carry out all of the purposes contemplated in its application by cooperative arrangements with the Norfolk. The Norfolk does not connect with the Virginian's proposed Itmann-Gilbert line at either end, nor can it do so except by expensive and wholly unnecessary new construction, but if it should be permitted to build the new line from Wharncliffe to Gilbert as proposed by it, that line would only handle a part of the westbound traffic originated by the Virginian, and would not in any way affect the handling of Chesapeake coal traffic in either direction. The Virginian and the Norfolk together could bring about only part of the public benefits obtainable and even that part at the expense of building an unnecessary line and hauling the business out of its natural and economical channel.

The construction of the proposed Wharncliffe-Gilbert line would only serve to create a second alternative route, as one alternative route already exists through Matoaka. I am unable to see that the existence of this second alternative route is essential to public convenience, or that it would yield public benefits worth anywhere near what it would cost to produce it.

In saying this, I have in mind that the proposed Wharncliffe-Gilbert line would cost in excess of $3,800,000 and, therefore, the annual interest would be $225,000 and the annual maintenance charge about $30,000. The figure which I have given as the cost of that line is taken from the Norfolk's application or return to questionnaire.

If we assume that one-half of the Virginian's westbound coal traffic would move over the line, which I consider would be the maximum proportion of the Virginian traffic which could be expected to move over the line from Gilbert to Wharncliffe, it would mean an additional charge of about $9.00 per car, or 45 cents per ton, for interest and maintenance alone, over and above the cost of transportation by way of the Gilbert-Chesapeake route. I have [fol. 236] made a calculation upon a basis similar to that used in estimating the costs for the other routes and find that the transportation cost per car of handling business via the Gilbert-Wharncliffe route over and above the cost of handling it via Gilbert and the Chesapeake is 90 cents per car, making a total of $9.90 per car upon the same assumption as to volume of business moving as I stated in estimating the additional cost of interest and maintenance. If a smaller volume of traffic be assumed the cost per car would be greater.

Cross-examination:

The 915,117 tons of coal mentioned by me in my direct testimony as having moved from the New River watershed through the Winding Gulf basin to the Norfolk at Matoaka during the first nine months of 1927 originated in what I have designated as sections 1 to 12. From the mines which produced the great bulk of that tonnage, there were available routes over the Chesapeake via Prince and Thurmond at the time of the movement, and I consider this the natural route for the movement of this tonnage. My estimates of savings are predicated upon the movement over the new line only of such tonnage as is entirely tributary thereto; and I have accordingly not taken into consideration in those estimates the 915,117 tons just mentioned. Whether this tonnage will move via Prince and Thurmond in the future of course I cannot say. That is affected by solicitation and other conditions from time to time, but

if it follows the natural route, the assumption is it will move by way of Prince and Thurmond, and I did not want to overstate the amount of tonnage available to the new line or tell the Commission that we would save more than I thought we really would save.

In making my estimate of the tonnage tributary to the new line, I considered that tonnage which is naturally tribu- [fol. 237] tary thereto, whether originating on the Virginian or the Chesapeake, and whether moving via the Chesapeake direct, Virginian and Chesapeake, or Virginian and Norfolk. I did not mean to convey the impression that the route by way of Matoaka would be closed or that we proposed to do anything about that. In view of the increase in tonnage from that section during the past few years, it was my judgment that the estimate I gave was probably a minimum of the tonnage that would be available to the new line. If the business continues to move through Matoaka in any considerable volume and the total production does not increase to an extent which would offset that, why then the tonnage over the new line would be less than in my estimate.

In making my estimate and in getting my locomotive rating, train haul, etc., I have entirely disregarded the fact that portions of the Virginian and portions of the Norfolk have been electrified. I have assumed the use over all the sections of track in respect to which I made comparisons of locomotives of the Chesapeake standard type, our 2-6-6-2. That is a Mallet locomotive which is not our most powerful, for we have a limited number of Mallet locomotives that have a greater tractive power than that one. Since I assume the same motive power in use over all the tracks in question, my comparisons practically amount to comparisons of distances and grades.

If the amount of tonnage which I have estimated—that is, substantially 3,000,000 or 4,000,000 tons per annum—eastbound and westbound, were to be handled through the relatively small interchange yard near where the tracks join at Gilbert, the facilities that would be required there would be relatively small compared with such facilities as the Baltimore & Ohio and the Virginian have at other places. I used the figure of $500,000 as the cost of such facilities, that being the figure shown in the Virginian return to questionnaire, but the operation, if I may say so, through

interchange at Gilbert, would not be as economical as the through movement from Elmore to Peach Creek yard. To [fol. 238] carry out my plan of running through from yard to yard, the Chesapeake has either to get some trackage rights over the Virginian, or the Virginian, if it builds the line, has got to get some trackage rights over the Chesapeake—that is, as related to the through movement.

The ratios of operating expenses of the Chesapeake to its operating revenues for each year from 1921 to 1926 was as follows:

For the year 1921, 79.6 per cent.
" " " 1922, 79.2 " "
" " " 1923, 77.4 " "
" " " 1924, 76.6 " "
" " " 1925, 72.2 " "
" " " 1926, 67.9 " "

C. B. Wall was called as a witness on behalf of the Chesapeake, and, having been duly sworn, testified as follows:

I am Vice-President of the Chesapeake.

Cross-examination:

The Chesapeake needs additional shop facilities. At the time when testimony was taken in the Norfolk-Virginian Lease case, the Chesapeake's Huntington shops were overworked, and work had to be let to contractors.

The Chesapeake then rested, and the case of the Norfolk was next heard.

[fol. 239] E. H. Alden was called as a witness on behalf of the Norfolk, and, having been duly sworn, testified as follows:

I am Vice-President in Charge of Finance and a Director of the Norfolk.

The Pocahontas Coal & Coke Co. was chartered October 11, 1901, and its charter was amended December 31, 1901.

The Norfolk purchased substantially all the stock of that company in 1901. Prior to 1901, the Pocahontas Coal & Coke Company was organized by parties interested in the United States Steel Corporation. During or before the year 1901 that company acquired the coal bearing lands formerly owned by the Flat Top Coal Land Association and some adjacent coal lands in the territory traversed by the Norfolk. Its holdings in 1901 were a large part of the lands in the Pocahontas coal field. The report was current in 1901 that the coal producing interests of the Chesapeake and Baltimore & Ohio had each been consolidated and this made important a friendly control of the Pocahontas Company by the Norfolk in order to prevent the building of competing lines of railway into the Pocahontas field, which lines, were unnecessary to develop the traffic and would have been economically wasteful. This could only be done through ownership and control of the lands in the Pocahontas fields. The future interests of the railway company required that the Pocahontas field should be controlled by the company and not by interests independent of the company or adverse to the company. It appeared that there would be great danger of the invasion of the Norfolk's territory by other lines of railroad, if other interests adverse to the company controlled the Pocahontas field, and that this danger would be averted and the company secured in its coal traffic by the purchase of the Pocahontas Coal & Coke Company. The purchase, as a collateral matter, involved also the location on the lines of the railway company of a large coal operation by the United States Steel Corporation. The Norfolk accordingly purchased the stock of the Pocahontas Company and contem- [fol. 240] poraneously, as a part of the general policy of securing the existing and future tonnages of coal for transportation, promoted the project of a railroad down the Guyan Valley from Elmore to Gilbert, and thence to Wharncliffe. The charter of the Guyandot was secured, the organization perfected and construction commenced. The Pocahontas Coal & Coke Company had coal areas in Guyan Valley and there were other coal areas near Wharncliffe. Those areas were to create reserve tonnages for the future.

The Pocahontas Coal & Coke Company is a land-holding company, without charter power to engage in mining, selling or shipping coal.

I have before me a true copy of an extract from the minutes of the meeting of the Board of Directors of the Norfolk which considered the acquisition of the stock of the Pocahontas Coal & Coke Company. The minutes of that board meeting contained a report of the Executive Committee which described the reasons for the acquisition as follows:

"In considering this matter, your committee have realized its great importance to the future interests of your company. In the quality of the coal and coke, thickness of seam, economy of operation and extent of the deposit, the Pocahontas Coal Field is admittedly without a superior. Should this vast property, producing millions of tons of coal and coke annually, be controlled independently of your Company, or by interests adverse to your Company, there would be grave danger that your territory would be invaded by other lines of Railway, and this danger would increase with the increase in the development of coal and coke. On the other hand, with this property controlled by your Company, this danger will be averted and your Company will be secure in its coal and coke traffic which already forms so large a portion of your Company's business and which is certain to increase in importance year by year."

Cross-examination:

(The following testimony is transcribed in the exact words of the witness as otherwise its precise meaning might be obscured:)

"Q. I notice from your answer that you define the purpose of the purchase of the Pocahontas Coal & Coke Company in 1901, as being the suppression of competition or the preventing of competition on the part of other railways [fol. 241] in the Pocahontas field. Was that the only purpose which the Norfolk & Western had in acquiring what you described as the virtual control of the Pocahontas Coal & Coke Company?

A. I would say that was the main purpose.

Q. And has that been since that time the principal purpose of the Norfolk & Western in retaining that control?

A. That has been the natural desire of the Norfolk & Western, yes.

Q. And am I justified in inferring that that purpose of preventing or suppressing competition actuated the Norfolk & Western in respect of all of the areas in which the Pocahontas Coal & Coke Company had these land holdings, wherever situated, in West Virginia?

A. Why I think I might say that, with the hope of the Norfolk & Western that all that territory would be tributary to its line?

Q. That is to say, in acquiring the holdings of the Pocahontas Coal & Coke Company wherever they were, the Norfolk & Western was endeavoring so far as it was possible to see to it that these areas should be served by it and not by any competing carrier?

A. I think so, yes."

[fol. 242] W. P. WILTSEE was called as a witness on behalf of the Norfolk, and, having been duly sworn, testified as follows:

I am Chief Engineer of the Norfolk, having occupied that position since July, 1923.

I offer in evidence a map showing the proposed line of the Norfolk and the surrounding territory.

Thereupon there was admitted in evidence the exhibit referred to, marked Exhibit No. 34.

(Here follows Exhibit No. 34, marked side folio p. 243.)

The witness testified further:

I offer in evidence a profile of the proposed lines of the Norfolk from Elmore to Wharncliffe.

Thereupon there was admitted in evidence the exhibit referred to, marked Exhibit No. 35.

(Here follows Exhibit No. 35, marked side folio p. 244.)

LINCOLN

WAYNE

BOONE

LOGAN

WEST VIRGINIA

KENTUCKY

MINGO

NAUGATUCK

LENORE

Odberton

Rockhouse Fk.

Ragland

WILLIAMSON

Pigeon Cr.

Hewett Cr.

Gilbert Cr.

GILBERT

WHARNCLIFFE

Buffalo Cr.

Guyandot River

Spruce Fk.

Elk River

Elk Cr.

Coal River

Little Coal

VGN. RY. EXTENSION

N. & W.

C. & O.

KANAWHA

FAYETTE

BOONE

RALEIGH

WHITE OAK JCT.

VIRGINIA

WYOMING

GILBERT

PINEVILLE

VGN. RY. EXTENSION

ELMORE

HARNCLIFFE

Surveyor

Pemberton

Raleigh

Stone Coal Jct.

Spruce Fk.

Elk

Guyandot

Laurel Fk.

Cabin

Still Run

Toney Cr.

Devils Fork

Marsh Fk.

Buffalo

Elkhorn

Pinnacle

Barkers

Indian

Wolf Cr.

Gilbert Cr.

Pigeon Hill

Buck Cr.

Dry Cr.

Burke Cr.

Rockcastle Cr.

Wilkinson Gulf

Williams

Dorothy

VGN

C. & O.

G. & T. R. R.

CKY

STATE LINE

WHARNCLIFFE

---VGN. RY. EXTENSION

N. & W.

TUG FORK

IAEGER

WELCH

Mc D O W

Gary

V I R G

N

W E

S

GUYANDOT AND TUG RIVER RAILROAD COMPANY

ELMORE TO GILBERT AND WHARNCLIFFE

SCALE 1 IN. = 4 MI.

4 0 4 8 12 MI.

OFFICE OF CHIEF ENGINEER ROANOKE, VA.... OCT. 16, 1925

·LEGEND·

G. & T. R. R. R.

VGN. RY. EXTENSION

11260

VGN. RY. EXTENSION

CLIFFE

ELMORE

MERCER

Matoaka

BLUESTONE

BLUEFIELD

IAEGER

WELCH

North Fork

Elkhorn

Gary

Princeton

Indian Cr.

Pinnacle

Barkers Cr.

VGN. RY.

BLUESTONE RIVER

EAST RIVER

STATE LINE

McDOWELL

VIRGINIA

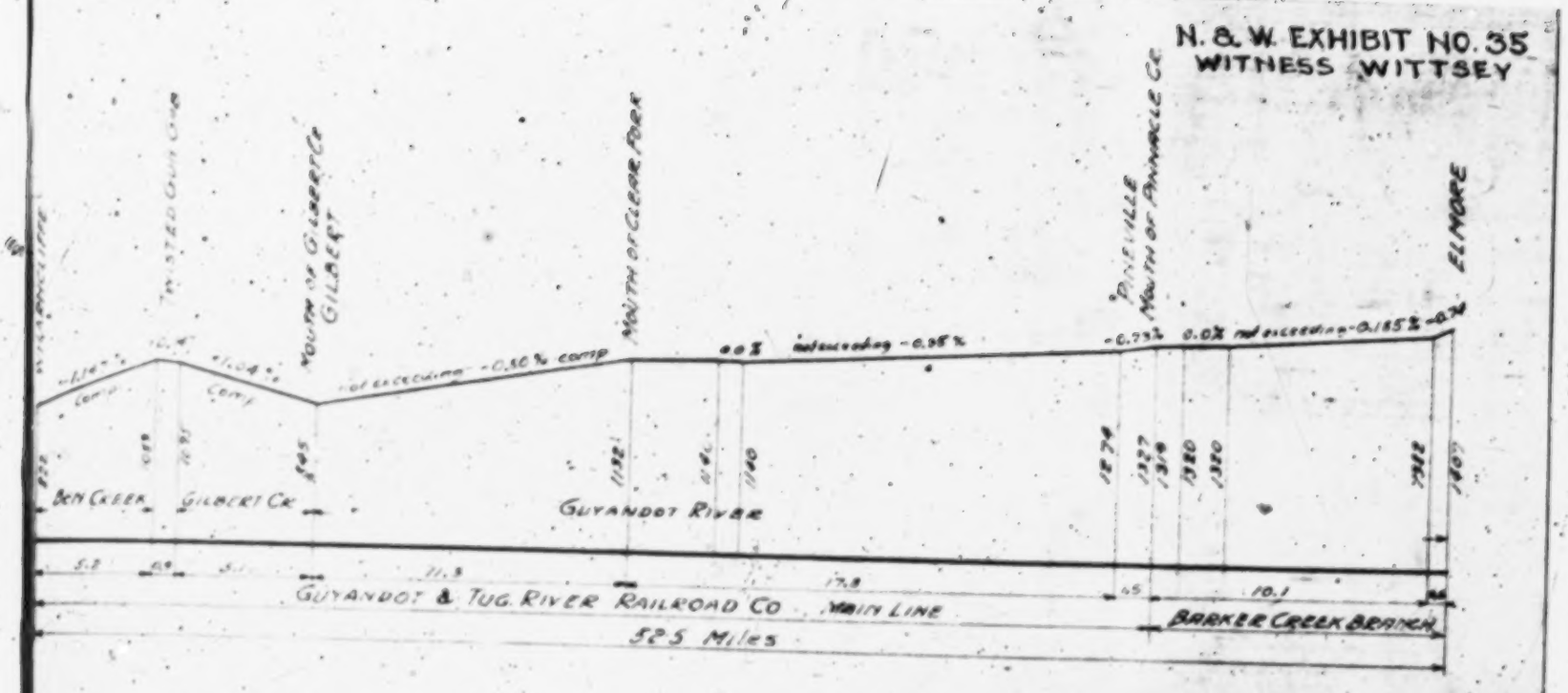
· LEGEND ·

G. & T.R. R.R. ———

VGN. RY. EXTENSION

11260

N. & W. EXHIBIT NO. 35
WITNESS WITTSEY



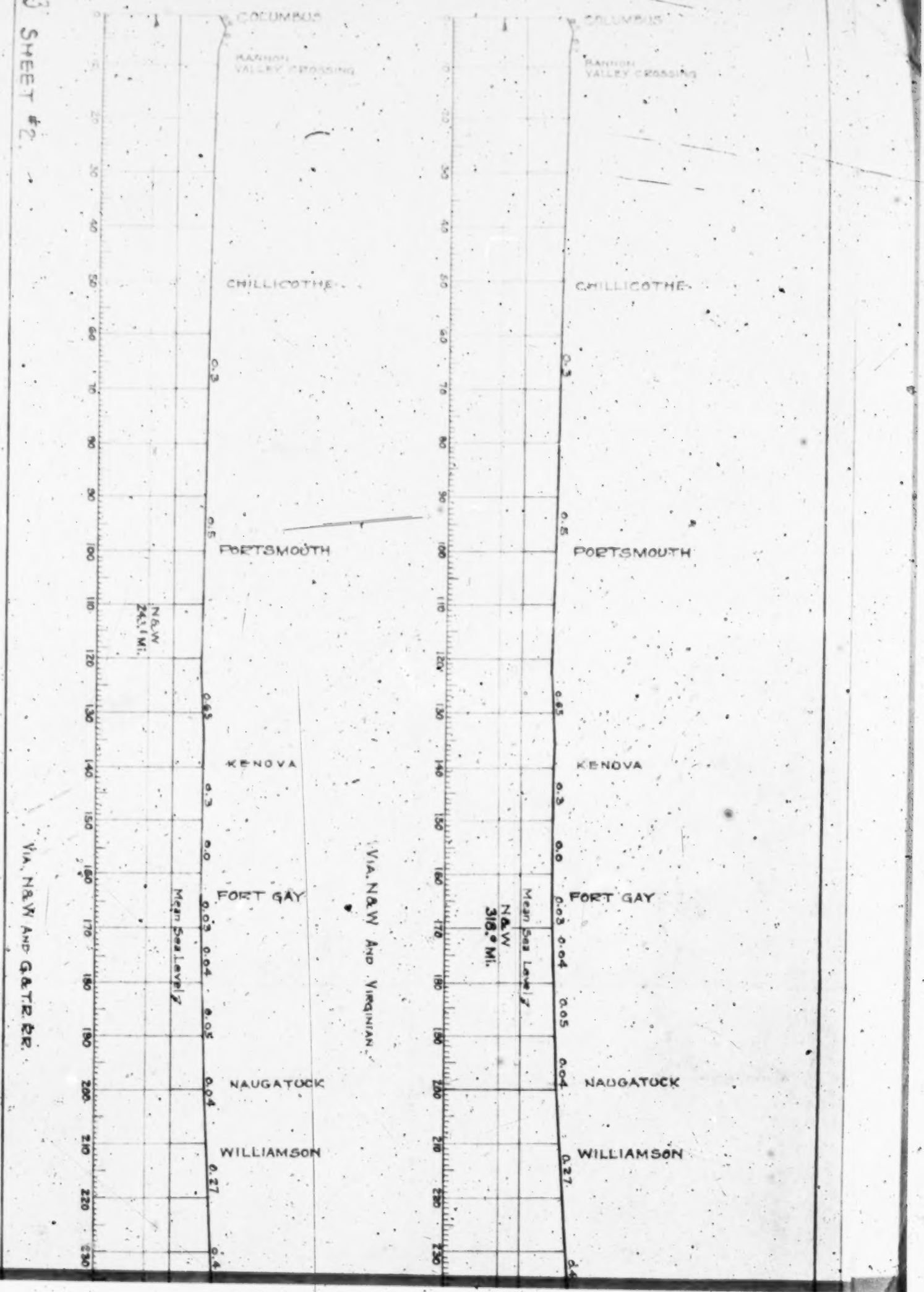
GUYANDOT & TUG RIVER RAILROAD COMPANY.
PROFILE OF PROPOSED LINE
ELMORE TO WHARNCLIFFE
VIA
GUYANDOT RIVER, GILBERT CREEK AND BEN CREEK.
SCALE. { Hor 1" - 6 Miles
Ver 1" - 1000 ft

N-10144

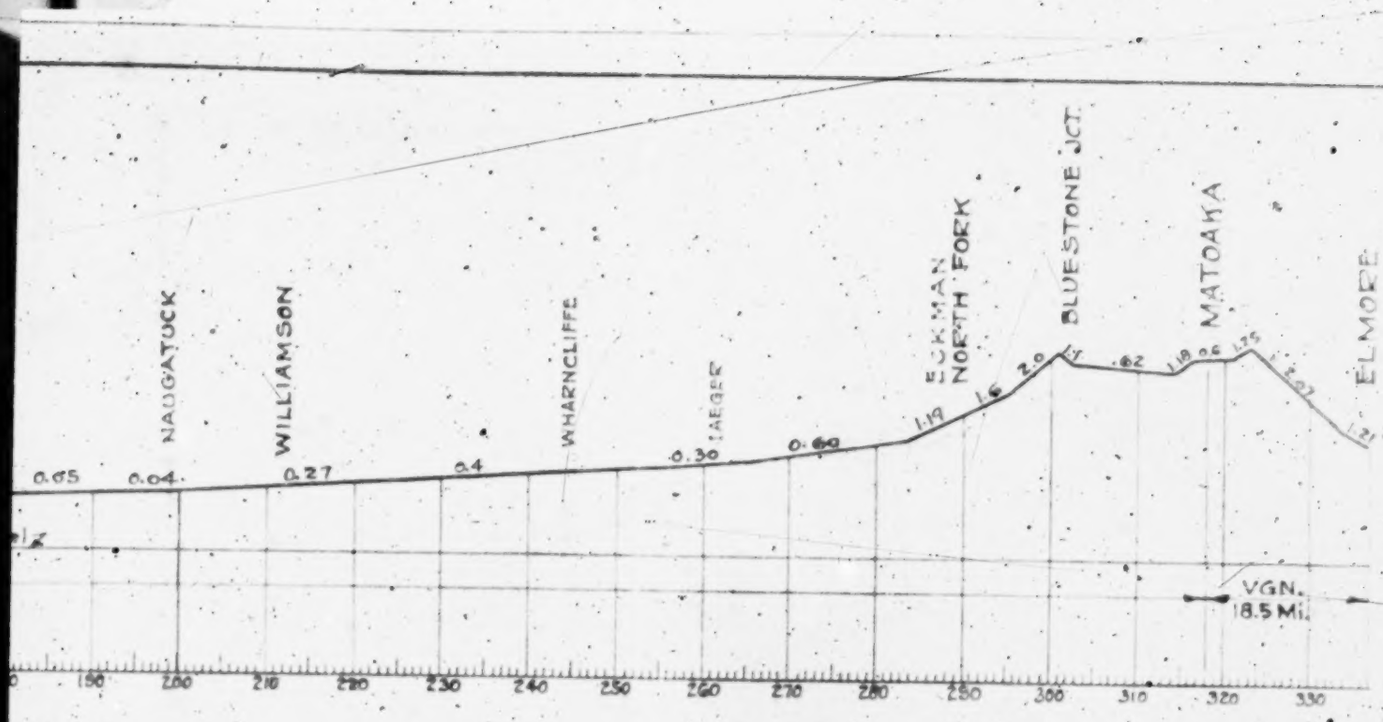
FROM Pollitzer A 368

OFFICE OF CHIEF ENGINEER ROANOKE VA JUNE 12 1926. N-10144

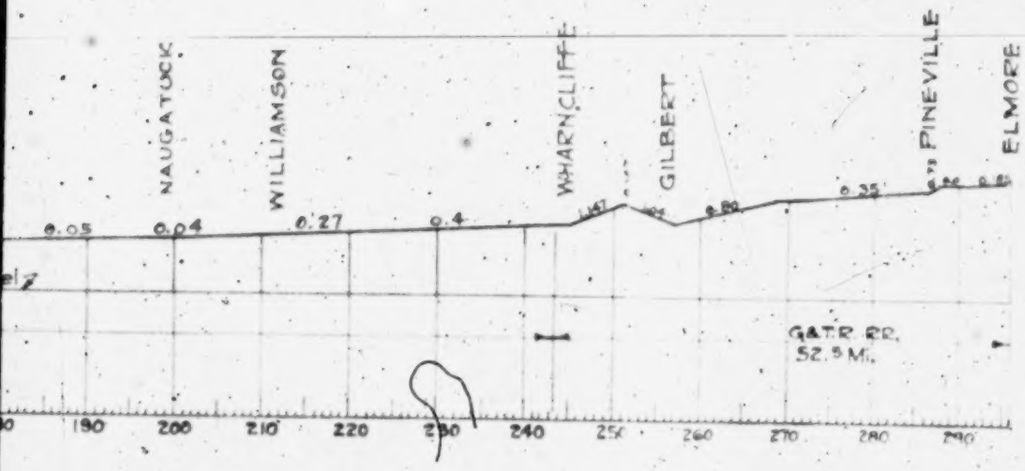
12603 SHEET #2



N.& W. EXHIBIT NO 50
WITNESS CRAWFORD



VIRGINIAN.



& T.R.R.

NORFOLK & WESTERN RAILWAY CO.

COMPARATIVE PROFILES

BETWEEN

COLUMBUS, O. AND ELMORE, W. VA.

Scale:- Hor. 1" = 20 MILES
Ver. 1" = 2000 FEET.

Office of Chief Engineer, Roanoke, Va. Sept. 6 1911

N-12603 SHEET #2.

The witness testified further:

The proposed line of the Norfolk will extend from Wharncliffe on the Norfolk's lines to a connection with the Virginian at or near Elmore. The general topography of the country from Wharncliffe to Elmore is mountainous. The proposed lines will follow up Ben Creek from Wharncliffe for 5.2 miles; then through a tunnel 4,400 feet in length to Gilbert Creek; thence down Gilbert Creek to the Guyandot River and up that river to Elmore, so that except for said tunnel the line will follow the above-named water courses.

The Ben Creek and Gilbert Creek Valleys are very narrow, with hardly any bottom lands. The surrounding country is mountainous, being mostly wooded, and very little cultivated, fairly well timbered and underlaid with coal; but the valley of the Guyandot River, though narrow and winding, has a narrow strip of bottom land traversed by the proposed line. This soil is clay, with outcropping of sandstone, shale and coal.

In the return of the Guyandot to the questionnaire, we estimated the cost of the line from Gilbert to Wharncliffe as $3,815,000. Specifications for this line have been altered, and a revised estimate of the cost of its construction is $2,600,000. The details of the estimate are shown on the statement which I now offer as an exhibit.

Thereupon there was admitted in evidence the statement referred to, marked Exhibit No. 37.

(Here follows Exhibit No. 37, marked side folio p. 244a)

(Vol. 241 a) N. & W. Exhibit #37, Witness Wilgus

Guyandot & Big River Railroad

Gilbert to Wharncliffe

Detailed Preliminary Estimate, Classified by I. C. C. Primary Accounts, of the Cost of Constructing a Proposed Line of Railroad from Gilbert to Wharncliffe, a Distance of 6.105 miles:

Acct.	1. Engineering	$106,000
"	2. Land for Transportation Purposes	201,000
"	3. Grading	558,000
"	5. Tunnels and Subways	674,150
"	6. Bridges, Trestles and Culverts	123,800
"	8. to 12 inc. Track, Track Materials, etc. as per N-2701	243,600
"	13. Right of Way Fences	12,600
"	15. Crossings and Signs	2,100
"	16. Stations and Office Buildings	500
"	17. Roadway Buildings	5,000
"	20. Telegraph & Telephone Lines	10,500
"	27. Signals and Interlockers	2,500
"	37. Roadway Machines	500
"	38. Roadway Small Tools	400
"	41. Other Expenditures—Road	103,550
"	70. Interest during construction	167,000
	Total Estimated Cost	$2,000,000

Estimate based on using 20 ton box cars, and 18 ton hopper cars on fills; also using original Big Sandy Line Tunnel Section with timber lining.

Office of Chief Engineer, Roanoke, Virginia, August 30, 1927.

The witness testified further:

(Vols. 245 & 246) There will be one grade adverse to west bound traffic on the proposed line between Gilbert and Wharncliffe which will have a maximum grade of 1.0% compensated for curvature, and will be for a distance of 3.4 miles from Gilbert up to near the summit. The maxi-

mum grade eastbound, which will be the direction of the empty coal car movement, between Wharncliffe and the summit, will be 1.147% compensated.

Practically all of the right of way between Elmore and Gilbert has been secured as well as some right of way purchased and grading done on the Wharncliffe end.

The total expenditure which has been made for the right of way, engineering, etc., amounts to approximately $263,000.

JOSEPH E. CRAWFORD was called as a witness for the Norfolk, and, having been duly sworn, testified as follows:

I have, for the past three years, been General Manager of the Norfolk. Between July, 1903, and the time when I became General Manager, I was Bridge Engineer, their Chief Engineer, and then Assistant General Manager for the Norfolk. I am familiar with the proposal of the Norfolk, through its subsidiary, to construct a line in Guyandot Valley, from Elmore to Gilbert and over to Wharncliffe. [fol. 247] I have been asked whether the new line will afford a more economical route for movement to the West of coal originating on the Virginian. In that connection, I will state when rates were established for that traffic, the volume of the movement since those rates were established, where coal originates, and will compare the present routes with that which the new line will afford. Following the decision of the Commission in the case of Wyoming Coal Company v. Virginian Railway, 98 I. C. C. 488, May 19, 1925, joint through rates on coal were established on the Pocahontas District basis via the Virginian, Matoaka, W. Va., and the Norfolk and connections to what may be generally described as the Central Freight Association territory. Those rates were made effective during the month of June, 1925, and the movement of coal thereon immediately started. During the year 1926, an average of over 246,000 tons of coal per month from mines on the Virginian were handled by this route and for the first nine months of this year (1927) the movement has averaged approximately 300,000 tons per month.

On January 25, 1927, by order of the Commission, rates to the west from Virginian mines were established via the Virginian, Deepwater, W. Va., and the Chesapeake.

The Chesapeake has shown an actual movement via Deepwater of 551,165 tons during the first nine months of 1927, which is equal to about 40 cars per day.

The greater part of the Virginian coal tonnage originates in what is called the Winding Gulf District, which includes mines on the main line of the Virginian between Clarks Gap and Elmore; on the Virginian & Western between Stone Coal and Mullens, and on its Winding Gulf and Stone Coal Branches, and is assembled at Elmore.

A check made of the actual movement of coal westbound via Matoaka in October, 1925 (in connection with I. C. C Finance Docket No. 4943) showed that over 80 per cent of [fol. 248] the westbound tonnage originated in the sections mentioned and encountered no adverse grades in the movement to Elmore. The Chesapeake has shown that during the first nine months of 1927, about 70 per cent of the Virginian westbound coal originated in the Winding Gulf District.

Winding Gulf District coal assembled at Elmore, if moved west, via the Virginian to Deepwater, W. Va., and thence via the Chesapeake, travels a distance of 151 miles from Elmore, W. Va., to the Ohio River at Kenova, W. Va., and between Elmore and Deepwater passes over three summits with adverse grades, as follows: Jenny's Gap Summit, with grade of 1.65 per cent; Harper Summit with grade of 1.11 per cent; and Silver Gap Summit with grade of 1.1 per cent.

In the rehearing of the Wyoming Coal Company case, Docket No. 14831, the Virginian testified that for movement Elmore to Deepwater continuous helper service is required for distance of 42 miles over a single track railroad that is equipped for handling effectively only in the opposite direction and that above twelve hours is consumed in train movement from Elmore to Deepwater.

All coal from the Virginian moving west via Matoaka and the Norfolk now travels a distance of 198 miles from Elmore to the Ohio River at Kenova, W. Va. If moved from Elmore over the proposed line, the distance from Elmore to Kenova would be reduced to 158 miles, or saving in distance of 40 miles.

I offer as Exhibit No. 50 a chart showing grades and distance of the present route of movement from Elmore

to Columbus via Matoaka, compared with the grades and distance via the proposed line. This chart is numbered K-12603, Sheet 2.

Thereupon there was offered and admitted in evidence Exhibit No. 50, which is in the following form:

(Here follows Exhibit 50, marked side folio, p. 249)

It will be noted from this chart that there are adverse grades on the present route of movement as follows:

[fol. 250] Between Elmore and Clarks Gap the distance is 15 miles. The line ascends continuously from Elmore to Clarks Gap, reaching a maximum controlling grade of 2.07 per cent.

From Matoaka via Bluestone Junction to the summit of the mountain at Coaldale, the distance is 19 miles. There are both descending and ascending grades. The maximum ascending grade to Bluestone is .62 of one per cent and from that point to Coaldale, 3 miles, it is 1.1 per cent.

The grades between Elmore and Clarks Gap, between Bluestone and Coaldale, and part of the grade between Matoaka and Bluestone are electrified.

Coal for the west moving through Matoaka is set off by the Virginian at Matoaka where the interchange is made; is handled from that point by the Norfolk with steam engines to its assembly yard, about 11 miles distant, known as Clift; is handled from Clift to Flat Top (in the vicinity of Bluestone Junction) by electric engines; generally it is set off at Flat Top and picked up by another electric engine for movement to Eckman, W. Va., which is the assembly yard on the west side of Coaldale Mountain. From Eckman movement is direct to Williamson, W. Va., (75 miles) by steam engine. If handled by the proposed line, train movement would be direct from Elmore to Williamson, thus avoiding setoffs at Matoaka, Clift, Flat Top and Eckman. Allowing six hours as the average time at each setoff point, the saving in car time and in time of movement to destination would amount to one full day on every car.

We estimate that the saving in mileage, car time and more favorable grades via the proposed line, will result in

an operating saving of approximately 14 cents per ton of coal handled via the proposed line versus the present route of movement via Matoaka.

Under the present operation, empty Virginian coal cars returning from the west must be hauled the entire length of our coal fields and returned to the Virginian at Mafoaka. This means that these empties must be hauled over Coal- [fol. 251] dale Mountain with an adverse grade of 2 per cent against movement from the west. If the proposed line is constructed these empties could be handled direct from Williamson to Elmore with one train movement, a saving in distance and lesser requirement of power. Also, we would then have available two points of interchange for the delivery of empty Norfolk coal cars to the Virginian for loading westbound and this would be an advantage, as cars from the east could be directed via Matoaka and cars from the west via Wharncliffe as might be desirable from day to day.

The new line will afford an outlet for an undeveloped area of coal land embracing approximately 390 square miles. This coal area lies in the valley of the Guyandot River between Elmore and Gilbert and the branches thereof. Based on estimates contained in reports of the West Virginia Geological Survey, and including tonnages in all seams reported irrespective of thickness, it appears that there are approximately 3,200,000,000 tons of coal in this area. We estimate that the quantity of minable coal is approximately one billion tons.

Approximately 60 per cent of the estimated minable tonnage is high volatile in character. Based on our past experience as to direction of movement of high and low volatile tonnage, we estimate that about three-fourths of the tonnage from this area will be marketed west of the Ohio River. The proposed line will afford a direct and economical outlet to such markets.

I estimate that three fourths of the tonnage, both high and low volatile combined will be marketed west of the Ohio River. The distance from Gilbert to Kenova via the Norfolk would be about 117 miles as compared with the Chesapeak's distance from Gilbert to Kenova 108 miles. Also the Norfolk will have an adverse grade five miles in length of 1.04 per cent between Gilbert and Wharncliffe.

Virginian coal westbound is assembled at Elmore. The distance from Elmore to Williamson via the proposed new line is 83 miles: One of our Y type Mallet engines would haul a 6400 ton train consisting of about 80 loads from Elmore to Wharncliffe, doubling the 5 miles of 1.04 per cent [fol. 252] grade between Gilbert and Wharncliffe. This train would fill out to 10,000 tons, or about 125 loads, at Wharncliffe with coal originating in this territory, thereby saving considerable mine run expense, and handle this 10,000 ton train from Wharncliffe to Williamson. The entire distance, including the doubling, would be less than 100 miles, consequently the doubling of this grade would be made at very slight additional expense.

The doubling would be on the connecting line between Wharncliffe and Gilbert which would not carry any overhead traffic for the Virginian or the Chesapeake, so that trains could readily be spaced to enable this doubling to be done without delay. In fact, if necessary, a 9,000 ton train could be handled out of Elmore and double the grade in three cuts, in which event the total mileage for the entire trip would only be 105 miles. The engine returning to Elmore would readily handle 125 empties. By either method of operation the cost of doubling would be less than one cent per ton.

The new line will provide such an outlet to the east and the west for such other products. We estimate that there are about 230 square miles covered with timber in the territory tributary to this line. One company, the Ritter Lumber Company, owns about 120,000,000 feet of timber in that territory, according to their advice to us. Lumber from this same general territory is ordinarily marketed in C. F. A. or Trunk Line territory, and the new line in connection with existing Norfolk lines will afford efficient routes for that lumber to those markets.

The movement of general merchandise and supplies for communities and mines in the coal field territory of the Virginian is largely from the west. With existing lines of railroad, the only available routes for movement of this traffic from the west are via the Chesapeake to a point of connection with the Virginian at Deepwater, W. Va., or via the Norfolk to a point of connection with the Virginian

at Matoaka, W. Va., and there are no joint rates via the [fol. 253] latter route.

The preponderance of the traffic to that territory requires movement through Elmore via each of those routes.

According to the exhibit filed by the Chesapeake in Finance Docket No. 4943, the Chesapeake delivered to the Virginian at Deepwater, W. Va., during the year, 1924, 5,228 cars of traffic destined to points on the Virginian in the State of West Virginia. This coal was said to include cars containing freight originating at Huntington and Charleston, West Virginia.

Whether traffic from the west for this consuming territory be handled by the Norfolk over the proposed line from Gilbert to Elmore or over that line by the Virginian under trackage rights, the proposed line would give a route of movement under much more favorable grade conditions than are now met with in movement via Deepwater, W. Va., and would be in the interest of the public in that competition between the Chesapeake and the Norfolk for movement up to the Virginian would be made available.

The proposed line would also provide a route for such traffic with better grades and shorter distance than any route available via existing lines of the Norfolk in connection with the Virginian.

It should be noted that this consuming territory is now practically dependent upon Charleston and Huntington on the Chesapeake as jobbing points. The proposed line would make Williamson, W. Va., on the Norfolk, available as a competing jobbing point. Williamson is a relatively important jobbing point, having a population, I should judge, of about 6,000 people, and several wholesale houses handling different kinds of goods, such as hardware, groceries, etc. Williamson jobs to coal-mine territory on the Norfolk surrounding Williamson, handling mine supplies, supplies for miners, groceries, and things of that sort. If the proposed line should be built by the Norfolk, it would afford railroad facilities for the jobbers at Williamson to reach the Virginian coal territory if they desire to and if the [fol. 254] business offered seemed to demand furnishing that service.

The new line will afford an opportunity to develop coal lands by branches from the proposed line. The principal

acreage of low volatile coal lies in the territory east of Pineville and south of the Guyandot River, along which the proposed line will be constructed.

The Pocahontas Coal & Coke Company, a subsidiary of the Norfolk owns 80,000 acres of low volatile coal land in this section. Some of this coal can be reached from the main stem of the proposed line, but a branch line on Pinnacle Creek from Pineville will be required to reach the bulk of it. We estimate that this branch line from Pineville to the mouth of Beartown Fork, a distance of 14 miles, would cost about $2,725,000.

Of the remaining coal area 30,000 acres of high volatile coal is owned by the Pocahontas Coal & Coke Company. Some coal is available from the main stem of the proposed line. To reach the remainder, construction of the following branches will probably be necessary.

Clear Fork Branch, connection at Simon, length 24.63 miles, estimated cost $1,250,000.

Little Huff Branch, connecting at Justice, length about 9 miles, estimated cost $700,000.

Horsepen Branch, connecting between Gilbert and Wharncliffe, length about 5 miles, estimated cost $600,000.

The proposed line would afford a better route than now exists for the movement of traffic in connection with the Virginian between C. F. A. territory and Virginia Cities or Carolina points. At the present time the Virginian does not participate in the handling of traffic from C. F. A. territory to Virginia Cities and the Carolinas, except through its connection with the Chesapeake at Deepwater, West Virginia. The construction of the proposed line will afford a new and better route for the movement of this traffic, either by way of the Chesapeake to Gilbert and thence over the proposed line under trackage rights to connection with [fol. 255] the Virginian to Elmore, West Virginia, or via the Norfolk to Gilbert and thence over the proposed line to Elmore, West Virginia.

It was testified for the Chesapeake in Finance Docket No. 4943 that during the year 1924 the Chesapeake delivered to the Virginian at Deepwater, West Virginia for destinations in Virginia, Carolinas, Georgia, Florida, Alabama and Cuba, 9,116 cars of freight. The proposed line would afford a better route for this traffic now moving via Deepwater

and the prospective increase in such movement in the future, as well as providing another route via the Norfolk and Virginian between the west and the Virginia and Carolina territory.

The Operating ratios of the Norfolk during each year since 1921 are as follows:

1921—79.25 per cent.
1922—75.27 "
1923—76.05 "
1924—71.51 "
1925—64.57 "
1926—59.13 "

[fol. 256] Cross-examination:

In my direct testimony, I estimated that the cost of doubling over the 1.04% grade between Gilbert and Wharncliffe, 5 miles long, would be less than one cent per ton. This estimate is based upon the assumption that we would handle the traffic either in 6400 gross ton trains or in 9000 gross ton trains. In other words, one of our steam locomotives would handle about 80 loads from Elmore to Williamson; doubling the haul, it would handle 40 loads up the hill and then come back and get the remaining 40, in which case that locomotive could fill out at Wharncliffe and take probably 40 additional loads into Williamson, or one locomotive would leave Elmore with 120 loads and double twice. The mileage from Elmore to Williamson is about 83 miles; so that our actual mileage covered, if they doubled once, would be less than 100 miles. If they doubled twice, it would be only slightly above 100 miles, and the only additional cost would be slight additional time of the locomotive and slight additional fuel expense. The doubling would probably involve 12 additional miles and would require an hour and a half or, for one doubling, probably only an hour.

(The following testimony is transcribed in the exact words of the witness as otherwise its precise meaning might be obscured:)

Q. Does it not come down to this, Mr. Crawford, that in order to put the Norfolk & Western into the Guyandot Valley you are in effect proposing the construction of two link lines, one from Gilbert to Wharncliffe and one Pinnacle

Creek-North Fork at a cost of considerably upwards of five million dollars?

"A. Yes, sir. I think if you consider the economics of it, it is necesary to consider that we have owned for a period of 25 years and held for the protection of our railroad 110,000 acres of land in the Pinnacle Valley, and economically that land was purchased and held to protect traffic on our main line. That main line has a capacity far beyond its present movement, and the low volatile coal near Elkhorn in that original Pocahontas field is becoming rapidly exhausted, so that the logical thing to do is to de- [fol. 257] velop that coal for that movement as it was always intended to do.

"Q. I think that is a very candid statement and it leads me to ask you this further question. Am I not correct in assuming that except for the interests of the Norfolk & Western Railway in the Pocahontas Coal & Coke Company it would never seriously consider the building of two link lines costing over five million dollars and the building of a line in the Guyandot Valley itself from Elmore to Itmann?

"A. The testimony heretofore given, and the testimony which some additional witnesses will give shows that there is very much business originating in that Guyandot Valley. Of course, it is possible that if the Norfolk & Western had not owned the fee right of way for twenty or more years through the Valley and had not bought and owned this land to protect its business, that it might not now be waging this fight; it might be waging a fight or it might have gone to some other territory to protect that business, but it is imperative with the investment we have to protect that business as has always been intended.

"Q. Would you not in all candor admit that the principal inducement of the Norfolk & Western in this proceding is that of serving the large coal tonnage which it owns through the Pocahontas Coal & Coke Company?

"A. That is one of the principal reasons, yes sir."

* * * * * * *

By Mr. De Jarnette: Does your railroad contemplate the building of this line immediately if the permit were granted?

"A. We would build this line whenever the business conditions seemed to justify it.

"Q. If the permit were granted the Virginian Railroad to build from Gilbert to Itmann, giving you trackage rights over the line, would your company be willing to build the Wharncliffe-Gilbert branch in order to connect with it?

"A. I do not understand the question.

[fol. 258] Mr. De Jarnette: Read the question.

(Last question read.)

"A. Yes, we would.

By Mr. De Jarnette:

Q. You would be willing to operate with the Virginian on that basis?

"A. Well, I assume if the Virginian built the line they would give us westbound business at Gilbert."

George Dunglingson, Jr., was called as a witness for the Norfolk, and having been duly sworn, testified as follows:

I live at Bluefield, W. Va., and have, for the past 10½ years, been Manager of the Fuel Department of the Norfolk. My duties are the management of the fuel mines owned and operated by the carrier, the general supervision of fuel matters, and special work assigned me by the management.

I am generally familiar with the coal resources tributary to the rails of the Norfolk and the Chesapeake, and the resources which can be developed from the construction of a line of railroad in Guyandot Valley, having recently made a study thereof, and prepared maps and tabulations to show the facts in connection therewith.

My qualifications for making such a study are as follows. I am a graduate of the Alabama Polytechnic Institute, with the degree of Bachelor of Science in Mining Engineering. I was a professional mining engineer for four years, with office at Goodwill and Bramwell, West Virginia. For four years I was a member, and for five years chairman, of the Car Allotment Commission of the Norfolk, the duties of which officers required a study of the mining conditions at all mines on the Norfolk in West Virginia, Virginia, and Kentucky. I belong to the American Insti-

KENTUCKY

OHIO

C&O RR MAIN LINE

K&M RR

OHIO WEST JT

C&O RR MAIN LINE

K&M RR

Charleston

Dana

C&O RR COAL LIMIT

Hazard

Hellen

EKRR

Whitesville

Beaverfield

Lenox

Abaline

Kenova

Barboursville

Huntington

Br

Wayne

Louisa

C&O RR MAIN LINE

WEST VIRGINIA KENTUCKY DIV

C&O RR

Chilton

Coal River Br

C&O RR

Altman

C&O RR Big Coal Br

Madison

C&O RR

Vun

Empire

Bald Knob

Logan

C&O RR

Von Leur

B&S&K RR

C&O RR

Prestonsburg

Carver

Nolansburg

Lenore

N&W RR

Williamson

Matewan

N&W RR

Stone

Devon

Wharncliffe

War Eagle

Panther

Logan

N&W RR

WEST VIRGINIA

Twin Branch

Davy

Welch

Roderfield

Gilbert

Justice

Switch

Baileysville

Bartley

Clear Creek

Oceana

Pineville

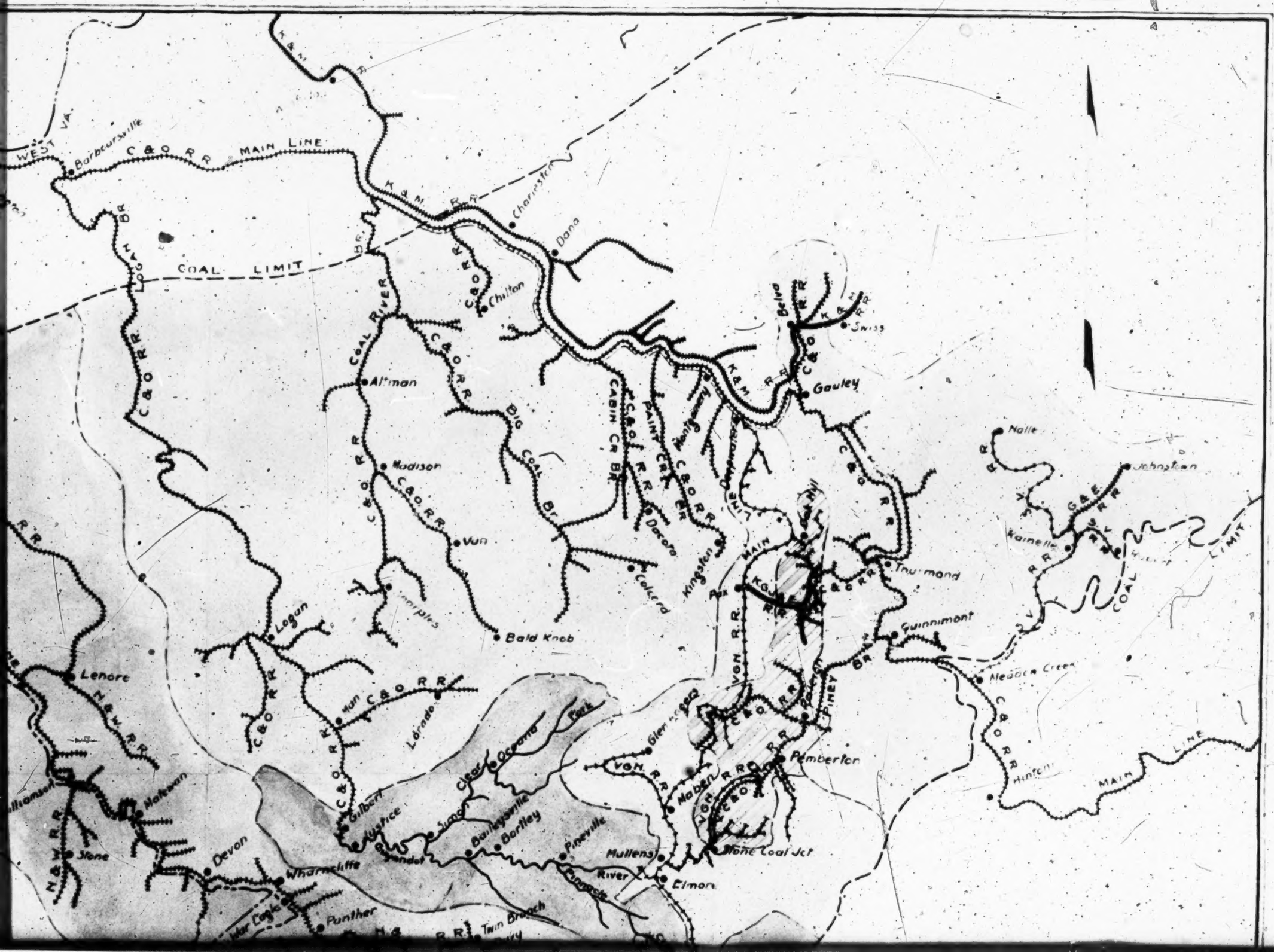
Lorado

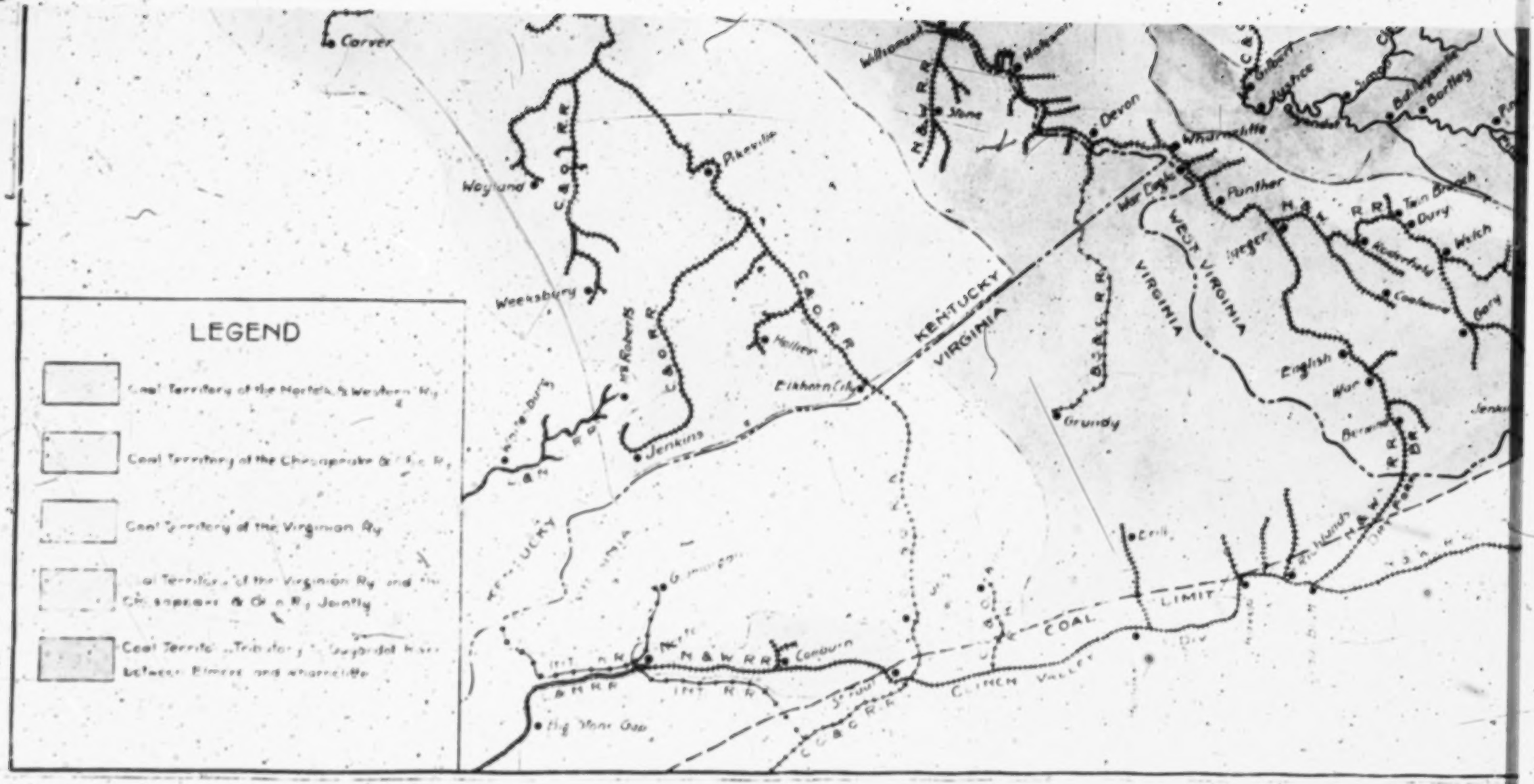
C&O RR

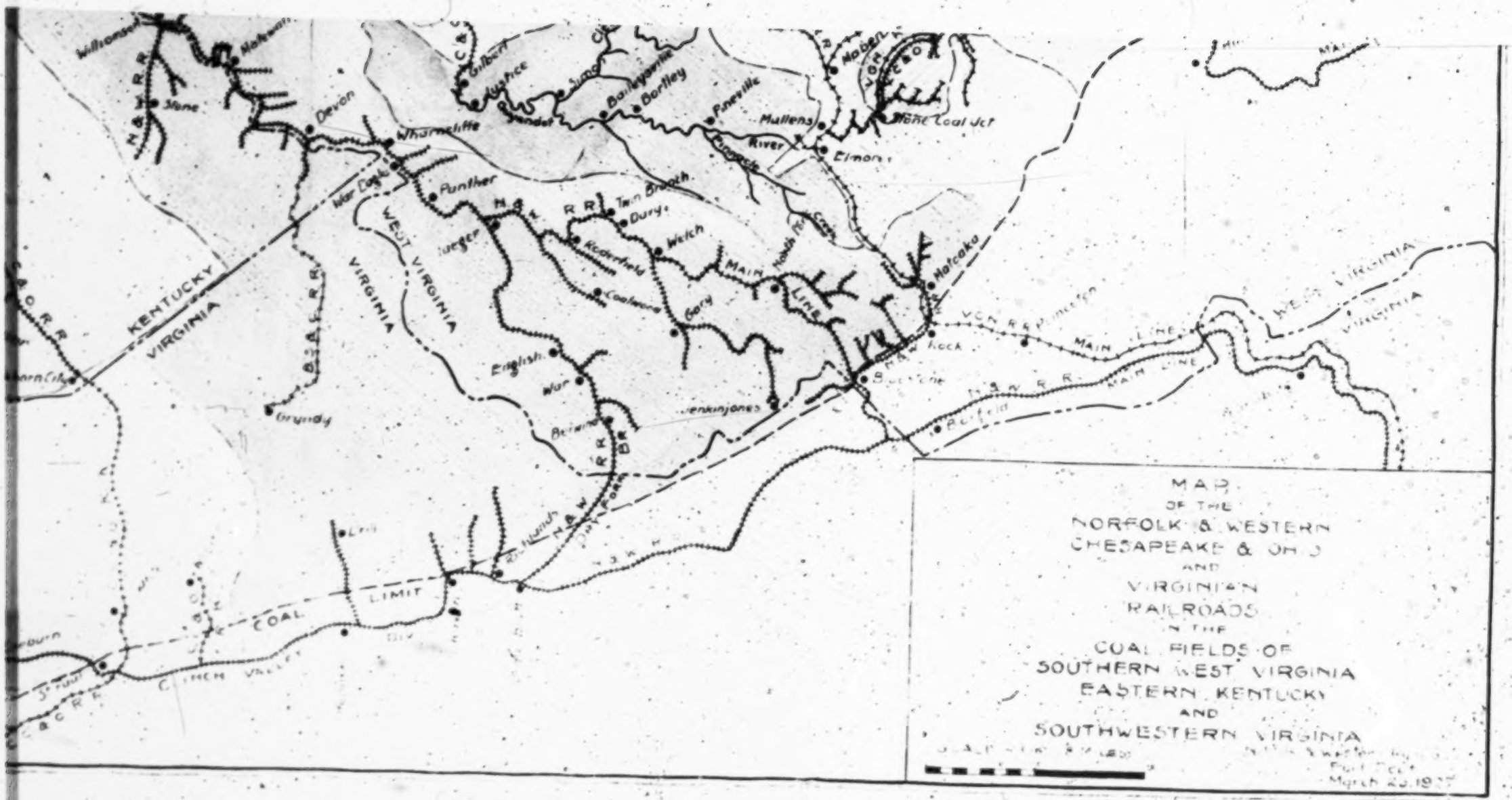
C&O RR

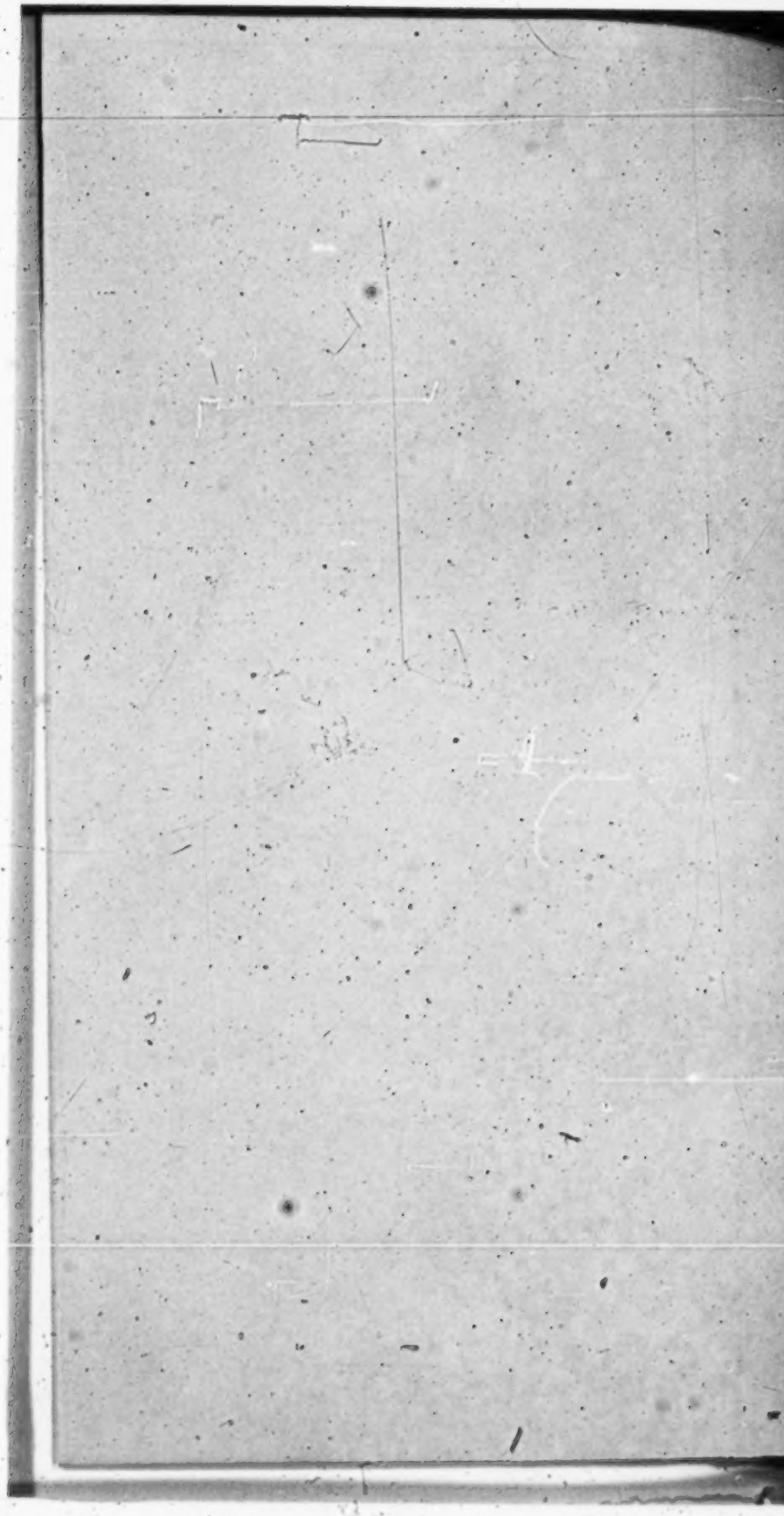
C&O RR

N+W Exhibit No. 54
Witness Duncanson




LEGEND
Coal Territory of the Norfolk & Western Ry
Coal Territory of the Chesapeake & Ohio Ry
Coal Territory of the Virginian Ry
Coal Territory of the Virginian Ry and the Chesapeake & Ohio Ry Jointly
Coal Territory Tributary to Loop Creek between Elkhorn and Williamson
Carver
Wayland
Weeksbury
Phoenix
Hellier
Elkhorn City
Jenkins
Williamson
Hatfield
Devon
Whitesville
Mac Eagle
Panther
Gilbert
Bartley
Dury
Welch
Keystone
Coalwood
Gary
English
War
Berwind
Jenkins
Grundy
Coal Creek
Big Stone Gap
KENTUCKY
VIRGINIA
WEST VIRGINIA
COAL LIMIT
CLINCH VALLEY
N&W R R
C&O R R
K&M R R
B&O R R
I&M R R
C&G R R
S. Rail
Div


Williamson
Naugatuck
N&W R.R.
Stone
Devon
Gilbert
Matheny
Iaeger
Bartley
Panville
Mullens
Elmore
Whitesville
War Eagle
Panther
Twin Branch
Dury
Welch
Kenova
Coalwood
Gary
MAIN LINE
Hatcake
KENTUCKY
VIRGINIA
WEST VIRGINIA
VIRGINIA
C&O R.R.
B.C.&G.R.R.
Grundy
English
War
Berwind
Jenkinjones
Bluefield
COAL LIMIT
Elkhorn
Clinch Valley
MAP
OF THE
NORFOLK & WESTERN
CHESAPEAKE & OHIO
AND
VIRGINIAN
RAILROADS
IN THE
COAL FIELDS OF
SOUTHERN WEST VIRGINIA
EASTERN KENTUCKY
AND
SOUTHWESTERN VIRGINIA



tute of Mining and Metallurgical Engineers, and an an associate member of the American Society of Civil Engineers.

I have prepared a map showing the coal territory tributary to the lines of the Norfolk, the Chesapeake, and the [fol. 259] Virginian in southern West Virginia, eastern Kentucky, and southwestern Virginia. This map, dated March 23, 1927, was prepared by me and I believe it correctly shows the information which it purports to show.

Thereupon there was offered and admitted in evidence Exhibit No. 54, which is in the following form:

(Here follows Exhibit No. 54, Witness Dunglinson, marked side folio, p. 260)

I have also prepared a tabulation of the estimated coal tributary to the Norfolk, the Chesapeake, and the Virginian, respectively, which may be summarized as follows:

Norfolk	20,948,000,000 tons.
Chesapeake	33,671,000,000 "
Virginian	2,318,000,000 "
Joint Chesapeake-Virginian	1,059,000,000 "
Guyan Valley	3,298,000,000 "
All railroads	61,294,000,000 "

In preparing the map Exhibit No. 54 the coal fields were carefully studied and their extent accurately shown on the map. The limiting lines between fields were first laid off on the county maps, which were drawn to a scale of one mile to the inch and then reduced to the size of the accompanying map, scale eight miles to the inch. This was done to reduce the chance of error and to make the composite map show as nearly accurate as possible the picture of the various fields in their correct relationship.

The peculiar situation of the Norfolk's coal fields is readily seen by looking at the map. The northern limit is at the end of the coal bearing territory which cuts across its main line in an easterly direction at a point about twelve miles south of Kenova. Continuing in a southerly and southwesterly direction the Norfolk's coal fields are bound on both sides by lands under development by the Chesapeake until we reach a point near Wharncliffe. Here the

western limits of the Norfolk's fields widen out and bound against the development of the Clinchfield Railroad.

A comparatively small area west of the Clinchfield Railroad is under development by the Norfolk in the vicinity [fol. 261] of Coeburn and Norton, Virginia, but this area is limited and is bounded by the coal fields of the Clinchfield, Louisville & Nashville and Interstate railroads.

The northern and northeastern limits of the Norfolk's fields south of Devon bound against the undeveloped area of the Guyandot Valley except in the extreme southern corner where they are limited by the Virginian coal field.

The southern limit of the Norfolk's coal fields is the end of the coal bearing area, which crosses the main line near Bluestone, W. Va.

The tabulation was made in an effort to size up in square miles and coal tonnage the several coal fields herein referred to. The extent in square miles of the territory tributary to each railroad and to the undeveloped Guyandot field was laid off on government topographical maps and measured. To arrive at the coal resources the geological survey reports of the three states were carefully studied.

The reports of the West Virginia Geological Survey contain estimates of the quantity of coal in all known coal seams, these estimates being given for magisterial subdivisions of each county. These tonnage estimates were carefully divided and allocated to the territory under development by each railroad and the resulting figures are shown by counties on the tabulation.

Similarly the Virginian Geological reports were studied and allocated and tabulated.

The Kentucky Geological reports contain no estimates of tonnage, but describe generally the various coal seams and their extent and from this information estimated tonnages, tributary to the coal fields of each railroad, by counties and states of all coal seams were made, using as a basis the estimates and information contained in the geological reports of the three states.

It should be clearly understood that the coal tonnages shown do not correctly indicate the amount of coal which will be mined in the defined areas. The estimates include the coal in all seams irrespective of thickness, mining con- [fol. 262] ditions and quality. Seams as thin as 12 inches

- LEGEND -

LOW VOLATILE COAL

HIGH VOLATILE COAL

LAND OWNED BY POCAHONTAS COAL & COKE COMPANY

E.
30,000 ACRES

OMAR

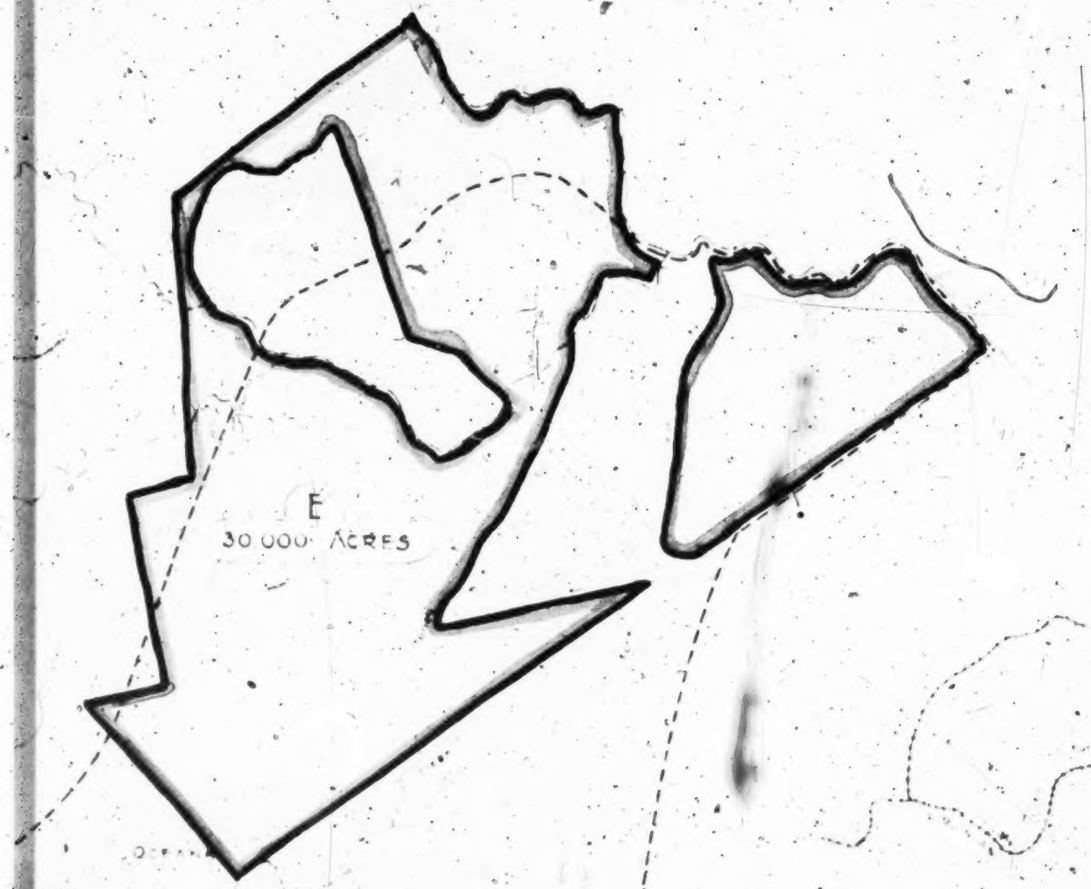
OCEANA

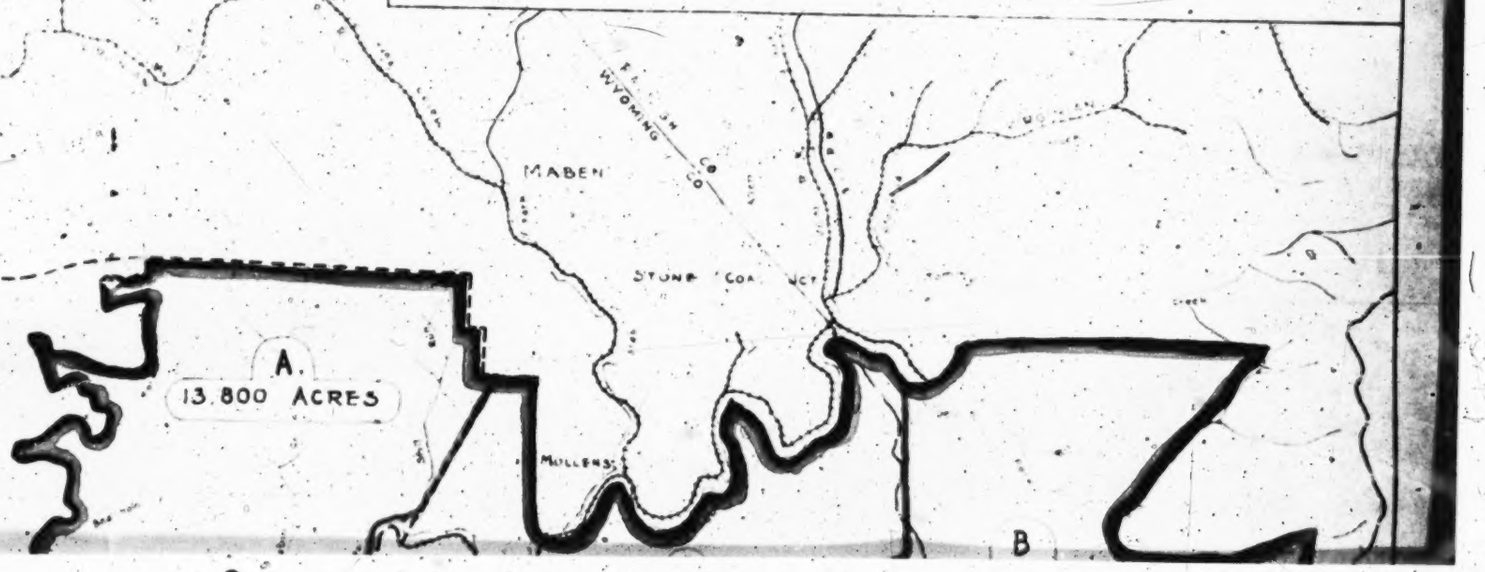
N & W Ex
Witness

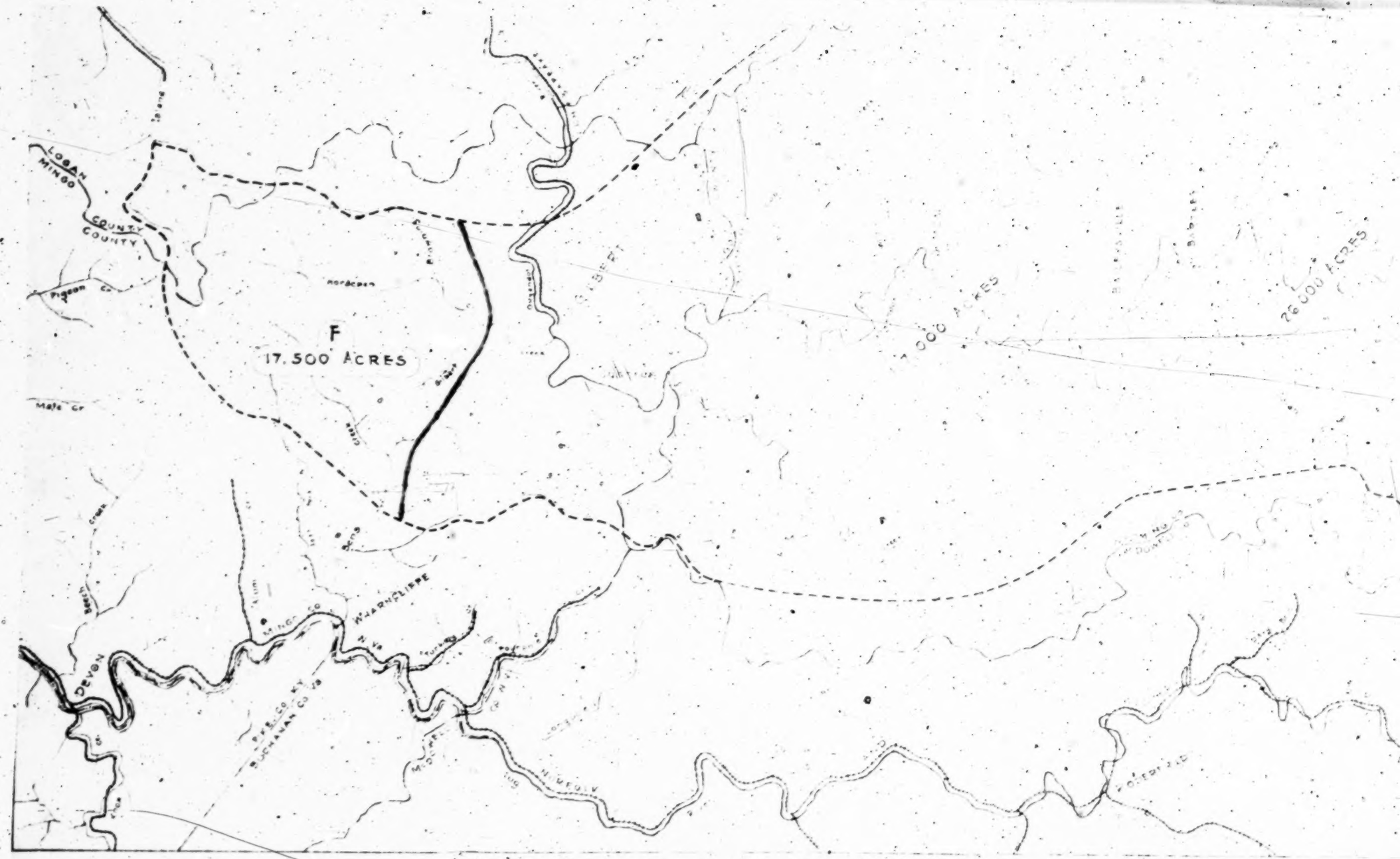
MAP
OF
COAL TERRITORY
TRIBUTARY TO
GUYANDOT RIVER
BETWEEN
ELMORE AND WHARNCLIFFE
AND ADJACENT LANDS OWNED BY POCAHONTAS COAL & COKE CO.

SCALE 1 INCH = 7000 FEET

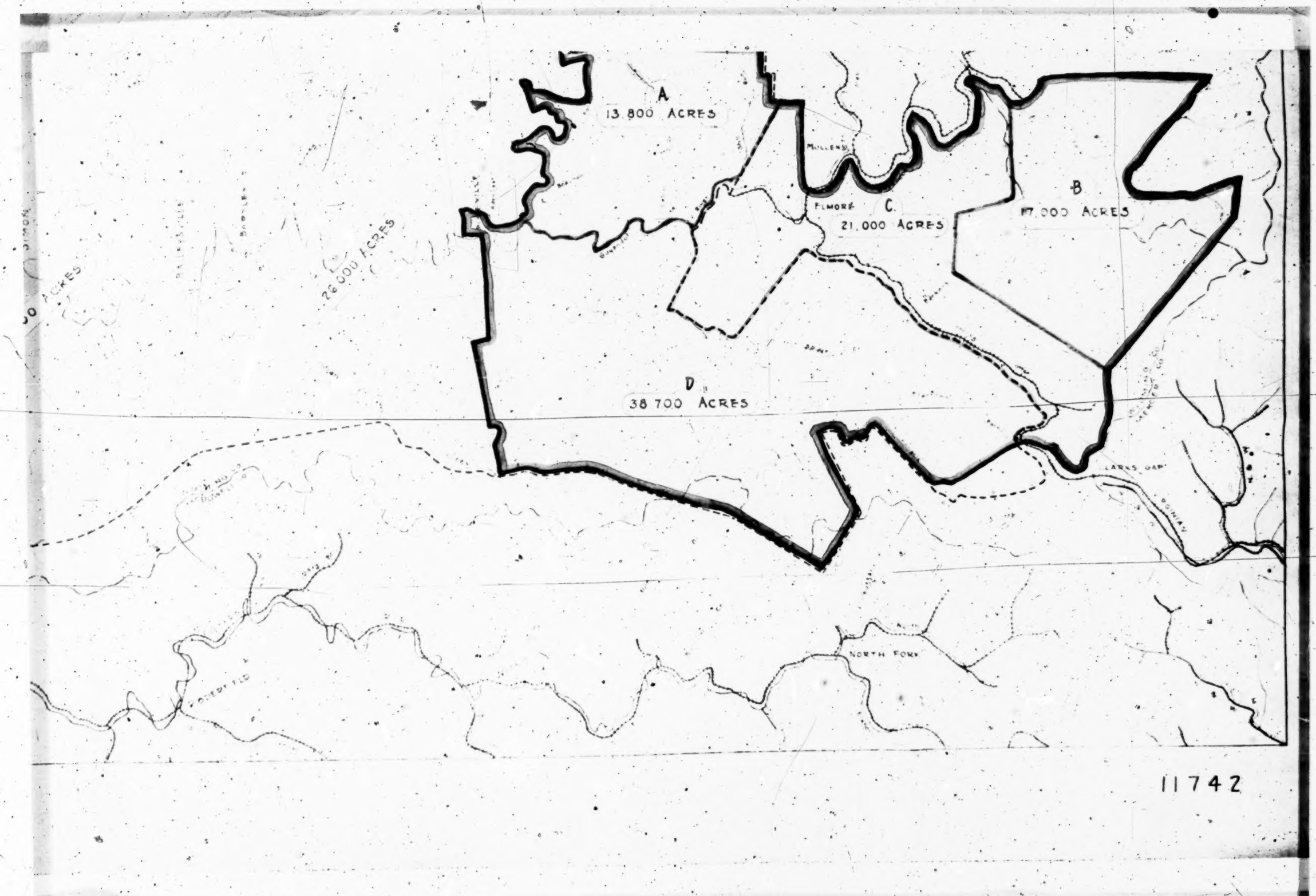
NORFOLK & WESTERN RY. CO.
OFFICE OF CHIEF ENGINEER
ROANOKE, VA.
OCTOBER 4, 1927






LOGAN
MINGO
COUNTY
COUNTY
Pigeon Cr
Mate Cr
F
17,500 ACRES
DEVON
WARFIELD
7,000 ACRES
26,000 ACRES

11742


A
13 800 ACRES
B
17,000 ACRES
C
21,000 ACRES
D
38 700 ACRES
MULLENS
FLMORE
26,000 ACRES
NORTH FORK
LAKES GAP
11742

in thickness are included and no allowances have been made for the destruction of the thinner and less important seams by the mining of the important seams. The tonnage figures to indicate the recoverable resources should in most instances be divided by three or four to get near the actual amount of coal which wil lbe won. The idea in preparing the tabulation was to measure the resources of each section and subdivision with the same yardstick and thus to get a picture of the relative situation rather than absolute figures.

The summary of percentages on Sheet 2 of the tabulation contains the most interesting information. The estimates indicate that in the State of West Virginia the Norfolk has under development 27.3 per cent of the area tributary to the three railroads (including the Guyan Valley) and that this proportion of the area contains 25.6 per cent of the total coal. The Chesapeake has under development 53.9 per cent of the total area containing 57.1 per cent of the total coal, exclusive of their proportion of the joint Chesapeake-Virginian area.

In the State of Virginia the Norfolk is the only railroad, of the three under discussion, involved.

In the State of Kentucky the Norfolk and the Chesapeake are the two railroads involved and the Chesapeake has under development 85.4 per cent of the area containing 82.3 per cent of the coal.

Taking the three states as a unit the estimates indicate that the Norfolk coal fields are 27.9 per cent of the total area and carry 34.2 per cent of the total coal, compared to the Chesapeake with 61.6 per cent of the area and 54.9 per cent of the coal.

The tabulation also indicates the proportion of square miles and tonnage tributary to the Virginian, and joint Chesapeake-Virginian, and Guyan fields.

I now produce a map outlining the coal deposits tributary to a line in Guyan Valley between Elmore and Gilbert.

Thereupon there was offered and admitted in evidence Exhibit No. 56, which is in the following form:

(Here follows Exhibit 56, Witness Dunglinson, marked side folio, p. 263).

[fol. 264] This map is drawn to the scale of 1 inch to 7000 feet. It is dated October 4, 1927 and was prepared in the

office of our Chief Engineer from information furnished by me, and I believe it correctly shows the information which it purports to show.

The coal territory described embraces the area lying in the Valley of the Guyandot River between Wharncliffe and Elmore and Gilbert and the branches thereof, the principal ones being Pinnacle, Indian, Clear Fork, Huff, Gilbert and Horsepen Creeks, shown in colors on the map, except the areas embraced in the sections marked B. and C. This undeveloped area is bounded on the east and northeast by the Virginian coal field, on the north and northwest by the Chesapeake coal fields, and on the south and south-west by the Norfolk's coal fields. It embraces approximately 390 square miles. The eastern portion is underlaid with low volatile coal, the western and northwestern portions with high volatile coal, and the central portion with low volatile coal and high volatile coal.

The Pocahontas Coal & Coke Company, a subsidiary of the Norfolk, owns approximately 128 square miles or 82,500 acres in this undeveloped territory, part of the holdings being in the low volatile section and part in the high volatile section. The low volatile section of the Pocahontas Coal & Coke Company's holdings, tracts A and D at the eastern end of the territory, embrace approximately 82 square miles or 52,500 acres, which is 67 per cent of the total low volatile area. The holdings of the Pocahontas Coal & Coke Company in the high volatile section, tract E, on the upper waters of Clear Fork Creek, embrace 46 square miles, or 30,000 acres.

There are in that territory 78,500 acres of low volatile coal, of which 52,500 acres, or 67 per cent, are under ownership of the Pocahontas Coal and Coke Company; and 164,500 acres of high volatile coal, of which 30,000 acres, or 18 per cent, are owned by the Pocahontas Coal & Coke Company.

I have made an estimate of tonnages expected from construction of the proposed line from Elmore to Wharn- [fol. 265] cliffe for the first five years following the completion of the line and thereafter, divided between high and low volatile coal, which is as follows:

At end of first year, 300,000 tons of low volatile coal, 100,000 tons of high volatile coal, total 400,000 tons.

At end of second year, 600,000 tons of low volatile coal, 200,000 tons of high volatile coal, total 800,000 tons.

At end of third year, 900,000 tons of low volatile coal, 300,000 tons of high volatile coal, total 1,200,000 tons.

At end of fourth year, 1,200,000 tons of low volatile coal, 400,000 tons of high volatile coal, a total of 1,600,000 tons.

At the end of fifth year, 1,500,000 tons of low volatile coal, 500,000 tons of high volatile coal, total, 2,000,000 tons.

I might say that all tonnages expressed in my testimony are short tons of 2,000 pounds each.

I estimate that the tonnage after the fifth year will continue practically as indicated for the fifth year.

I have also made an estimate of tonnages expected from construction of a line on Pinnacle Creek from Pineville to the headwaters thereof and connecting at North Fork, which is as follows:

At the end of the first year, 500,000 tons of low volatile coal.

At the end of the second year, 1,000,000 tons of low volatile coal.

At the end of the third year, 1,500,000 tons of low volatile coal.

At the end of the fourth year, 2,000,000 tons of low volatile coal.

At the end of the fifth year and thereafter, 2,500,000 tons of low volatile coal.

The total holdings of the Pocahontas Coal & Coke Company, with the exception of several isolated and small tracts lying in Giles, Pulaski and Montgomery counties, Virginia, which are entirely detached from the main body here under discussion, and also with the exception of not quite 3,000 acres of land in Mingo County, under lease to the railroad [fol. 266] company for fuel development, are 293,941 acres. Of this total acreage approximately 119,500 acres lie on the water shed of the Guyan River, this being 40.6 per cent of the total.

Those areas outlined in heavy blue lines on Exhibit 56 are the holdings of the Pocahontas Company.

The holdings of the Pocahontas Coal & Coke Company tributary to the Guyandot River west of Elmore or thereabouts and on the water shed of Clear Fork Branch of the

Guyandot River is approximately 27.7 per cent of all the holdings of the Pocahontas Coal & Coke Company.

I estimate that the minable coal within the heavy-dash lines of Exhibit 56, east of Gilbert, amounts to 410,000,000 tons of low volatile coal and 470,000,000 tons of high volatile coal. Between Gilbert and Wharncliffe, in the same area, I estimate that there are 120,000,000 tons of high volatile coal.

Cross-examination:

With reference to Exhibit No. 56, I may say that in the western end of the property shown thereon is a tract marked "F". The significance of the separation by a green line of that tract from the rest of the high volatile coal area is that the tract indicates in a general way the area tributary to the proposed line between Gilbert and Wharncliffe.

STIPULATION

It was stipulated that the parties may refer to the printed reports of the Commission in Dockets Nos. 13832 and 14454, and in Finance Docket No. 4943.

HOWARD N. EAVENSON was called as a witness for the Virginian, and, having been duly sworn, testified as follows:

I am a consulting mining engineer. I graduated from Swarthmore College in 1892. In the course of my practice, [fol. 267] I have had occasion to become personally familiar, through intensive study, etc., with the coal deposits in the territory served by the three railroads involved in this case.

I have made the following estimate of the number of tons of recoverable coal remaining in the ground tributary to the Virginian, the Norfolk, and the Chesapeake:

Tributary to the Chesapeake, 4031.5 square miles of coal-bearing lands, containing 13,336,946,500 net tons of coal under three feet thick; and 24,262,966,000 net tons over three feet thick, making a total of 37,599,912,500 tons. 2,642,-

012,000 tons have been extracted, leaving 23,620,954,000 tons over three feet thick and a total of 36,956,900,500 tons;

Tributary to the Norfolk, 2738 square miles containing 16,540,160,000 tons under three feet thick, and 13,378,805,000 tons over three feet thick, making a total of 29,918,965,000 tons. There have been extracted 651,658,000 tons, leaving 12,727,147,000 tons over three feet thick and a total of 29,267,307,000 tons;

Tributary to the Virginian, 832.5 square miles containing 3,276,331,500 tons under three feet thick, and 3,442,459,000 tons over three feet thick, making a total of 6,698,790,500 tons. There have been extracted 82,110,000 tons, leaving 3,340,349,000 tons over three feet thick and a total of 6,616,680,500 tons.

In making the foregoing estimates, I have assigned the joint mine territory one-half to the Chesapeake and one-half to the Virginian. I made use of the Virginia, West Virginia and Kentucky Geological Survey reports, and a large amount of information collected by me personally.

M. B. GOLDBLATT was called as a witness for the Virginian, and, having been duly sworn, testified as follows:

I am Auditor of the Virginian.

[fol. 268] Cross-examination:

The Virginian at present charges depreciation on steam locomotives at 2%; on electric locomotives at 2½%; and at 2% on freight and passenger train cars, floating equipment and working equipment. If the Chesapeake charges 4% on all those items—that is, locomotives, freight and passenger train cars, floating equipment and working equipment—it would make a material difference in the operating ratio of that carrier.

If the Virginian had charged depreciation at 4%, instead of at the rates above set out, the Virginian's operating ratio would be increased by about 3%.

H. W. Walker was called as a witness for the Virginian, and, having been duly sworn, testified as follows:

I live in Norfolk, Va., and am Coal Development Engineer for the Virginian. I had two years technical training at the Virginia Polytechnic Institute, Blacksburg, Va., leaving there in 1901 when I went into the office of the Chief Engineer of the Norfolk at Roanoke, remaining with that Company for about two years. I then went with the Virginia Bridge and Iron Company at Roanoke in the designing department for about 10 months, after which I was for about three months with the Pocahontas Coal and Coke Company engaged on some special work of mapping coal properties and calculating acreages. From there I went with the United States Coal and Coke Company at Gary, W. Va., where I remained for several months, leaving to go with the Tidewater Railway Company, now the Virginian. I have been with that Company continuously since the fall of 1904. Beginning as a rodman, I worked as chainman, instrument man, and draftsman until 1910, when I was made Office Engineer. From that time my work had largely to do with coal resources and coal development, and about 1914 I was made Engineer of Coal Development.

[fol. 269] My duties in that capacity are to collect all information likely to be useful about coal and timber properties, coal development, and the coal trade in general, with special reference, of course, to territory on the Virginian or territory that can be reached by Virginian branches or extensions, and to existing mines or prospective development in such territory. In addition, I have studied and collected information about the coal fields, coal and coal operations on the Chesapeake and the Norfolk in West Virginia, Virginia and Kentucky.

I estimate the coal presently and in the future minable in the Guyandot River Valley and its tributaries between Itmann and Gilbert as follows:

The distance from the end of the present Guyandot River Branch at Itmann, down the Guyandot River to Gilbert, is 40.1 miles and the territory directly tributary to this line is estimated at 79 square miles, divided as follows:

Itmann to Pineville, 10.1 miles of line, 18 square miles of territory, 70,000,000 presently minable tons of smokeless coal.

Between Pineville and Bartley, 10.4 miles of line, 18 square miles of territory, 48,000,000 tons of smokeless coal presently minable.

Between Bartley and Simon, 8.5 miles of line and 21 square miles of territory, 3,100,000 tons of gas coal and 17,000,000 tons of smokeless coal presently minable.

Between Simon and Gilbert, 11.1 miles of line and 22 square miles of territory, 5,000,000 tons of gas coal presently minable, and no smokeless coal.

The distance from Simon up Clear Fork and Laurel Fork of the Guyandot River to the end of the present tracks at Morri is 23.4 miles, and I estimate there are 46 square miles of territory directly tributary to such line, containing 73,900,000 tons of splint and gas coal and 50,000,000 tons of smokeless coal, presently minable.

The adjoining territory on the south side of the Guyandot [fol. 270] River between Itmann and Gilbert, including Gilbert Creek, contains 144 square miles, and my estimate of tonnage presently minable for this territory is as follows:

Pinnacle Creek and Beartown Fork, 23 square miles, 78,000,000 tons of smokeless coal.

Indian Creek, 49 square miles, 4,200,000 tons of gas coal and 99,800,000 tons of smokeless coal.

Litle Huff Creek, 41 square miles, 26,000,000 tons of gas and splint coal and 24,000,000 tons of smokeless coal.

Gilbert Creek, 31 square miles, 175,000,000 tons of gas coal and no smokeless coal.

My estimate of the future minable coal for the above territory is 13,200,000 tons.

The territory on the north side of Guyandot River between Itmann and Simon on Still Run, Cabin Creek, Bearhole Fork, Rockcastle Creek and Turkey Creek, contains about 38 square miles with 300,000 tons of gas coal and 319,700,000 tons of smokeless coal presently minable. The future minable coal in this territory is estimated at 5,000,000 tons.

The territory on the north side of Guyandot River covered by the water shed of Big Cub Creek contains 23 square miles and I estimate 109,000,000 tons of splint and gas coals presently minable and no smokeless coal in this territory. The future minable coal is estimated at 70,000,000 tons.

The territory on the north side of Guyandot River on Clear Fork and Tony Fork and north of Laurel Fork, contains 40 square miles, and I estimate 340,800,000 tons of minable splint and gas coals. The future minable coal is estimated at 140,000,000 tons.

Summing up the above estimate for the Guyandot River and tributaries between Itmann and Gilbert, including Gilbert Creek, we have 737,300,000 tons of splint and gas coals and 706,500,000 tons of smokeless coal that can be mined at present, and the future minable coals amount to 228,200,000 tons.

[fol. 271] My estimate of total tonnages available to the three roads is as follows:

	30 to 56"	Over 56"	Total
Chesapeake	2,750,800,000	24,019,700,000	26,770,500,000
Norfolk	2,405,500,000	12,789,700,000	15,195,200,000
Virginian	455,700,000	3,216,000,000	3,671,700,000

A. M. Trautgott was called as a witness for the Virginian, and, having been duly sworn, testified as follows:

I live at Norfolk, Va., and am Chief Engineer of the Virginian. After leaving Purdue University I entered the service of the Deepwater Railway, a predecessor in title of the Virginian, in February, 1903, as rodman on surveys between Elmore and Deepwater, and in the early part of 1903 the surveying party with which I was located was transferred to the surveys down the Guyandot River from Elmore. After serving as rodman, draftsman, instrument man, locating engineer and resident engineer on location and construction, I was appointed division engineer in April, 1913, of the lines east of Roanoke, and transferred in February, 1914, as division engineer on lines west of Roanoke. In May, 1919, I was appointed Acting Chief Engineer of the Virginian for the United States Railroad Administration, which position I held until the railroad was returned to the railway company, when I was appointed assistant chief engineer. On February 1st, 1927, I was appointed to my present position of chief engineer.

I am also chief engineer of the Virginian & Western and have been its chief engineer or assistant chief engineer since its incorporation.

The future development of the coal fields tributary to the Guyandot River line will require the completion of the main line of the Virginian & Western from the end of the track at Morri down Clear Fork to Simon on Guyandot River and certain branch lines. The length and approximate estimates on present day costs of these lines are as follows:

[fol. 272]	Length in miles	Approximate estimate
Virginia & Western main line, end of track at Morri to connection at Simon	23.4	$2,200,000
Up Clear Fork from the mouth of Laurel Fork near Oceana	7.0	500,000
Still Run	2.0	150,000
Cabin Creek	3.0	200,000
Pinnacle Creek	23.0	2,300,000
Bear Hole Fork	4.0	280,000
Rock Castle Creek	4.0	280,000
Turkey Creek	2.0	150,000
Indian Creek	15.0	1,500,000
Big Cub Creek	5.0	400,000
Little Huff Creek	10.0	1,000,000
Gilbert Creek	8.0	700,000

Even if there were no local business on the Elmore-Gilbert line, the necessity for its construction is apparent from a study of the map and profiles of the lines of the Chesapeake, the Norfolk, and the Virginian leading from the coal fields in the upper Guyandot basin to the West and from the coal fields in the lower Guyandot basin to the East.

Study of the profile showing grades and distances over which coal originating in the upper Guyandot River basin moves at present via the Virginian to Matoaka and thence via the Norfolk to the West, discloses that the objections to this route are the rise of 1125 feet on a 2.07% ruling grade between Gulf Junction and Matoaka, and the distance, which is 39.1 miles longer than via the proposed Virginian line.

Study of the profile showing the grades and distances over which the same coal would move if hauled by the Virginian via the proposed line and delivered to the proposed connecting line of the Norfolk at Gilbert discloses a saving

over the present route in heavy grades, and a saving of 39.1 miles in distance. The grades on the proposed route are descending excepting the short grade of 1.40% (should be 1.04) just west of Gilbert on the proposed connecting line of Norfolk.

[fol. 273] CHARLES H. HIX was called as a witness for the Virginian, and, having been duly sworn, testified as follows:

I am President of the Virginian.

It is evident that coal originating in the upper Guyandot Basin, whether on the Chesapeake or the Virginian, can move more expediously and more economically to the west via the proposed line than via Deepwater or Prince and the Chesapeake because of the great advantage in grades with an approximately equal mileage; and that coal so originating can move to the west more economically and expeditiously via the proposed line than via Matoaka and the Norfolk, whether it moves from Gilbert over the Chesapeake or over the Norfolk by way of Wharncliffe and notwithstanding the Virginian electrification, because of the advantage in grades and distance.

The diversion to the proposed new line of the traffic now routed via Matoaka and the Norfolk will not be important to the Norfolk, particularly if this traffic or a portion of it comes to the Norfolk again at Wharncliffe, and the diversion to the new line of westbound traffic, which would otherwise go via Matoaka, will not affect the Virginian, both because its place will largely be taken by new traffic originating on the proposed line and because the diversion of westbound traffic to the proposed line will to a certain extend postpone expenditures which will be necessary sooner or later for handling increased traffic between Elmore and Princeton.

The Virginian's estimate of overhead coal traffic is conservative. The Virginian itself is now shipping in excess of 3,000,000 tons of coal to the west and this traffic is increasing. Most of the westbound coal from present Virginian tracks could move over this line, and all of it could so move if a connection were established with the Norfolk

via Gilbert and Wharncliffe, and it would be so much to the advantage of the Chesapeake and its shippers to use this line for their west bound low volatile coal originating in the Guyandot Basin and for their eastbound high volatile coal originating in the Logan field, that it seems inevitable that it would be so used.

[fol. 274] Cross-examination:

(The following testimony is incorporated in the exact words of the witness because its precise import might otherwise not appear.)

"Q. The question I intended to ask is after you reach Gilbert is not the best westbound connection as to grades and so forth the Chesapeake & Ohio?

A. I consider it so, yes.

Q. Now, right in that connection, I notice you said in speaking of the proposed line, that most of the westbound coal from the present Virginian tracks could move over this line, meaning the proposed line, and that all of it could so move if a connection were established with the Norfolk & Western via Wharncliffe and Gilbert. Have you any doubt that the Chesapeake & Ohio could handle at Gilbert westbound coal that might be offered via this proposed line?

A. That is possible, but my recollection is that the Norfolk & Western reaches some points that the C. & O. does not.

Q. What points have you in mind?

A. None especially, but I think another witness will be able to clear that up for you.

Q. You do not yourself think of any gateways that the Norfolk & Western reaches that the C. & O. did not reach?

A. I did not say gateways; I said some points.

Q. Is what you have in mind points local to the Norfolk & Western line?

A. Yes, sir.

Q. So far as the substantial movement of westbound coal is concerned, I take it any points to which that movement would occur could be reached by the C. & O., could they not?

A. Yes, sir.

Q. All that you had reference to in that statement was any local points served by the Norfolk & Western?

A. That is all.

[fol. 275] Q. You were not speaking of the capacity of the line to handle traffic?

A. No."

* * * * * * *

"Q. Now, Mr. Hix, I wish to ask a few questions about the operation of this proposed line. As I understand your testimony, you think that the certificate for the construction of this line should be granted to the Virginian Railway without condition?

A. I do.

Q. You also think the reasons are as set forth in your testimony that it should be operated exclusively by the Virginian Railway?

A. Yes, sir.

Q. And there should be no trackage rights over it?

A. I do.

Q. The granting of the certificate should be unaccompanied by any conditions of that character?

A. Yes, sir.

Q. Now, if that were done, taking coal originating in Chesapeake & Ohio mines in the Winding Gulf district, what would be involved would be a haul up the Chesapeake & Ohio to Stone Coal, a haul by the Virginian Railway to Gilbert and then a haul by the Chesapeake & Ohio Railway to points beyond, would it not?

A. Yes.

Q. And as to coal originating on the Virginian Railway east of Elmore moving west, the movement would be first by the Virginian to Gilbert and then a haul by the Virginian's connections at Gilbert from that point on?

A. That is right.

Q. It would be a two-line operation in either case and a triple operation, so to speak, the same line moving it twice and another line once in the other case?

A. Yes, sir.

[fol. 276] Q. As to eastbound coal it would similarly involve a haul by the Chesapeake & Ohio from the Logan

district to Gilbert, then the haul by the Virginian to Stone Coal or Pemberton and a haul by the Virginian Railway—by the Chesapeake & Ohio Railway from that point on, would it not?

A. I had hoped we would haul it all the way to Sewall's Point.

Q. I have no doubt you did.

A. If that is the route you suggest, that is possible.

Q. Now, do you think, Mr. Hix, that either one of those arangements is advantageous from the standpoint of public interest? Would each interchange mean a delay?

A. I think it is the most practical, common sense way of handling traffic in the Winding Gulf basin. I think it is folly to pull coal up a 2.30 grade when you have a down grade to another double track line for hundreds of miles. That is my honest opinion. I think a heavy traffic like that should be confined to more advantageous operating conditions than pumping it up a hill at 25 cars at a time.

Q. On the same argument you just made, it would be folly for any Virginian Railway Coal passing over that proposed line as far as Gilbert to move by any other route except the Chesapeake & Ohio, would it not?

A. Yes, sir.

Q. That is the logical route?

A. That is the logical route, yes.

* * * * * * * * *

By Mr. Younger:

"Q. Mr. Hix, did I correctly understand you to concur in the suggestion by Mr. Tunstall, that it would be folly, after this proposed line is built by some carrier, to send Virginian westbound coal west from Gilbert via the route of the Norfolk & Western through Wharncliffe?

A. Not some carrier but if built by the Virginian I think it would be folly to deliver it to a road with a grade of 1.04 [fol. 277] as against practically a level grade. And besides, Mr. Younger, there must be some reciprocal meeting with this proposition and I do not see that you would have anything that you could give us for our westbound coal.

Q. Suppose you built this line without any agreement as to trackage rights or what not and you interchanged with either the C. & O. or the Norfolk & Western at Gilbert, do

you still think it would be folly to send the coal west over the Norfolk & Western route?

A. I think that we should, as far as we could, divert coal or get control of the routing of coal and give it to the line that could give us something in return.

Q. You mean you would give it to the C. & O. if they would let you into the Logan District?

A. Or if they would give us the eastbound movement.

Q. But if they would not do that, do you think it would be folly to send it over the Norfolk & Western?

A. It would be immaterial to us if we did not get something for it from either line.

Q. Your statement, then, is predicated wholly upon the idea that you would get some compensating advantage from the C. & O. in other directions rather than from the operating difficulties via the respective routes?

A. Yes.

Q. If you fail to get those compensating advantages from the C. & O., that is, if they refused to turn over to you the eastbound Logan coal at Gilbert or to give you traffic rights up into the Gilbert field, then your statement would have no application?

A. So far as routing coal by the Norfolk & Western?

Q. Yes, sir.

A. It would be entirely a matter of solicitation between the two companies.

Q. And there would be no folly in sending it via such a route?

A. No."

[fol. 278] S. M. Adsit was called as a witness for the Virginian, and, having been duly sworn, testified as follows:

I live in Norfolk, Va., and am Traffic Manager of the Virginian. For fifteen years immediately preceding May 1, 1907, I was General Freight and Passenger Agent of the St. Joseph and Grand Island Railway, St. Joseph, Mo. Beginning with May 1, 1907, and continuing to date, I have been in charge of the Traffic Department of the Virginian, serving the U. S. Railroad Administration in that capacity during the period of Federal control.

It is a fact that the through rates in effect by way of Matoaka and the Norfolk carry coal to some destinations in the

northwest not reached by the through routes in effect by way of Deepwater and the Chesapeake. This situation can be explained as follows:

The Interstate Commerce Commission, Dockets 13832 and 14454, ordered the Virginian to establish rates from certain specifically named mines on its line to western destinations, which rates should be no higher than the New River District rates published in certain specified tariffs of the Chesapeake from mines on that line. The order, however, made no reference to any particular junction point of the Virginian through which the rates should apply. It was therefore felt that the establishment of the rates via Matoaka in connection with the Norfolk would fill the requirements of the order. The Commission, however, would not agree to this and in effect insisted that the rates should be published to apply also via Deepwater in connection with the Chesapeake. The Virginian carried its opposition to this to the United States Supreme Court where a decision [fol. 279] was handed down sustaining the position of the Commission. Rates were accordingly published for application via Deepwater, effective January 25, 1927. There were several reasons why the Virginian objected to the application of any through rates on coal to the West from Deepwater. Perhaps the most important reason is that the cost of handling the coal to Deepwater is greater than the cost of handling it to Matoaka. The cause of this has already been explained Another reason is that the Chesapeake refuses to allow the Virginian to include its entire field in its tariff providing for rates via Deepwater and confines the application to the mines served exclusively by the Virginian, excepting, on account of the requirements of the fourth section of the Interstate Commerce Act, only the joint mines that are strictly intermediate. This creates an unnatural and unusual and an awkard situation.

Since the establishment of the through rates on coal via Deepwater this case, upon petition of the Virginian, has been reopened. The Railway's purpose in this proceeding is to secure the Commisson's authority to cancel the rates now in effect applicable via Deepwater, it having been satisfactorily shown, we believe, that the rates applicable via Matoaka do in fact adequately meet the needs of the coal operators on this line. This case has been heard, briefed, argued and submitted. The pendency of this case explains

the failure of the Virginian to publish rates via Deepwater to certain western and northwestern destinations. These destinations were not included in the original order of the Commission and in view of the possibility of the cancellation of all current rates on coal applicable via Deepwater it was not considered advisable to voluntarily establish any additional rates. The absence, however, of through rates to the Northwest via Deepwater has had but little, if any, adverse effect on the movement from Virginian local mines via that junction. During the ten months ended October 31, 1927, twenty-six per cent of the movement west from Virginian local mines was shipped via Deepwater. A greater proportion would perhaps be shipped that way but for the fact that the shippers are aware of the operating difference [fol. 280] on the Virginian comparing the route to Deepwater with the route to Matoaka, and on this account prefer the latter. And besides the Matoaka route has some drawing power of its own. If reference is made to witness Marshall's Exhibit No. 26, pages 7 to 10, inclusive, it will be seen that practically every joint mine is shipping coal west via Matoaka and in substantial volume. These mines could, of course, ship over the Chesapeake, but for some reason find it desirable to ship a considerable part of their output in connection with the Virginian via Matoaka.

Westbound coal originating on the Virginian should be handled by the Virginian to Gilbert over the proposed line for delivery there to the Chesapeake for the movement beyond, and in return the Chesapeake should deliver a corresponding amount of coal to the Virginian at Gilbert for movement to tidewater or to inland points of destination in Virginia and the Carolinas. Under such an arrangement each carrier would be compensated for the shortening of its haul.

Cross-examination:

(The material portion of this cross-examination is here transcribed in the exact words of the witness because its reduction to narrative form might alter its import.)

By Mr. Younger:

Q. Do I understand correctly from the last paragraph of your manuscript that you propose to deprive the Norfolk & Western of its participation in the Virginian westbound

coal traffic and send it all west over the Chesapeake & Ohio if you are permitted to build this proposed line?

A. Not necessarily, Mr. Younger. These are matters that will come up if we build this railroad, but that is a practical proposition I am putting up there.

Q. What do you mean by the phrase, that the traffic should be handled by the Virginian to Gilbert over this proposed line for delivery there to the C. & O. for movement beyond? Do you mean all of the traffic in its entirety?

A. Well, I am dealing now with the coal traffic.

[fol. 281] Q. I mean coal.

A. That contemplates a reciprocal arrangement with the C. & O.

Q. And if you are successful in making a reciprocal arrangement with the Chesapeake & Ohio you want no arrangements at all for the interchange of traffic with the Norfolk & Western?

A. That will depend on what arrangement is made.

Q. If you are not successful in making such a reciprocal arrangement with the Chesapeake & Ohio then you do want to make an interchange with the Norfolk & Western?

A. We have an open gateway there.

CERTIFICATE AND ORDERS OF INTERSTATE COMMERCE COMMISSION

Certificate and Order Issued July 23, 1928

AT A SESSION OF THE INTERSTATE COMMERCE COMMISSION, DIVISION 4, HELD AT ITS OFFICE IN WASHINGTON, D. C., ON THE 23RD DAY OF JULY, A. D. 1928

Finance Docket No. 6067

Construction of Line by VIRGINIAN & WESTERN RY.

Finance Docket No. 5161

Construction of Line by GUYANDOT & TUG RIVER R. R. Co.

Finance Docket No. 4818

Proposed Construction of Lines by Chesapeake & Ohio Ry. Co.

Certificate and Order

A hearing and investigation of the matters and things involved in these proceedings having been had, and said divi-

sion having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof.

It is hereby certified, that the present and future public convenience and necessity require the construction by the Virginian & Western Railway Company of the line of railroad in Wyoming and Mingo Counties, W. Va., described in its application in Finance Docket No. 6067 and in the [fol. 282] report aforesaid: Provided, however, and this certificate is issued upon the express condition, that the construction of said line of railroad shall be commenced on or before January 1, 1929, and be completed on or before December 31, 1931.

It is further certified, that the present and future public convenience and necessity require the construction by the Guyandot & Tug River Railroad Company of that part of its proposed line of railroad extending from Gilbert to Wharncliffe, in Wyoming and Mingo Counties, W. Va., described in its application in Finance Docket No. 5161 and in the report aforesaid: Provided, however, and this certificate is issued upon the express condition, that the construction of that part of the proposed line between Gilbert and Wharncliffe shall be commenced on or before January 1, 1929, and be completed on or before December 31, 1931.

It is ordered, That as to all other matters the application of the Guyandot & Tug River Railroad Company in Finance Docket No. 5161 be, and it is hereby, denied.

It is further ordered, That the Virginian & Western Railway Company and the Guyandot & Tug River Railroad Company shall report to this Commission, in writing, the commencement and the completion of construction of the lines of railroad herein authorized within 15 days after such commencement and completion, respectively.

It is further ordered, That the Virginian & Western Railway Company and the Guyandot & Tug River Railroad Company, when filing schedules establishing rates and fares applicable on the respective lines herein authorized to be constructed, shall in such schedules refer to this certificate and order by title, date, and docket number.

It is further ordered, That this certificate and order shall take effect and be in force from and after 30 days from its date.

It is further ordered, That the Virginian & Western Railway Company and the Guyandot & Tug River Railroad Company shall report to this Commission as required by Valuation Order No. 24, effective May 15, 1928.

[fol. 283] And it is further ordered, That the application of the Chesapeake & Ohio Railway Company in Finance Docket No. 4818 be, and it is hereby, denied.

By the Commission, division 4.

George B. McGinty, Secretary. (Seal.)

Order Issued August 20, 1928

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 20th Day of August, A. D. 1928

Finance Docket No. 6067

Construction of Line by Virginian & Western Ry.

Finance Docket No. 5161

Construction of Line by Guyandot & Tug River R. R. Co.

Finance Docket No. 4818

Prosposed Construction of Lines by Chesapeake & Ohio Ry. Co.

Order

Upon further consideration of the record in the above-entitled proceedings:

It is ordered, That the effective date of the certificate and order issued in these proceedings on July 23, 1928, be, and it is hereby, postponed for 30 days from the effective date thereof as set fourth in said certificate and order.

By the Commission.

George B. McGinty, Secretary. (Seal.)

Order Issued Sept. 5, 1928

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 5th Day of September, A. D. 1928

Finance Docket No. 6067

Construction of Line by Virginian & Western Ry.

Finance Docket No. 5161

Construction of Line by Guyandot & Tug River R. R. Co.

[fol. 284] Finance Docket No. 4818

Prosposed Construction of Lines by Chesapeake & Ohio Ry. Co.

Order

Upon further consideration of the record in the above-entitled proceedings:

It is ordered, That the effective date of the certificate and order issued in these proceedings on July 23, 1928, as postponed by order entered August 20, 1928, be, and it is hereby further postponed to October 22, 1928.

By the Commission.

George B. McGinty, Secretary. (Seal.)

Order Issued Oct. 1, 1928

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 1st Day of October, A. D. 1928

Finance Docket No. 6067

Construction of Line by Virginian & Western Ry.

Finance Docket No. 5161

Construction of Line by Guyandot & Tug River R. R. Co.

Finance Docket No. 4818

Prosposed Construction of Lines by Chesapeake & Ohio Ry. Co.

Order

Upon further consideration of the record in the above-entitled proceedings, of the petition of the Chesapeake &

Ohio Railway Company for reconsideration and reargument; and of the replies of the Virginian & Western Railway Company, the Virginian Railway Company, the Norfolk & Western Railway Company and the Guyandot & Tug River Railroad Company to said petition:

It is ordered, That said petition be, and it is hereby denied.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 285] Order Issued Oct. 20, 1928

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 20th Day of October, A. D. 1928

Finance Docket No. 6067

Construction of Line by Virginian & Western Ry.

Finance Docket No. 5161

Construction of Line by Guyandot & Tug River R. R. Co.

Finance Docket No. 4818

Proposed Construction of Lines by Chesapeake & Ohio Ry. Co.

Order

Upon further consideration of the record in the above-entitled proceedings, and of the further petition of the Chesapeake & Ohio Railway Company for reconsideration and reargument:

It is ordered, That the effective date of the certificate and order issued in these proceedings on July 23, 1928, be and it is hereby, further postponed to November 22, 1928, except in so far as said certificate and order authorizes the Virginian & Western Railway Company to construct a line of railroad in Wyoming and Mingo Counties, W. Va.

By the Commission.

George B. McGinty, Secretary. (Seal.)

Order Issued Nov. 1, 1928

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 1st Day of November, A. D. 1928

Finance Docket No. 6067

Construction of Line by Virginian & Western Ry.

Finance Docket No. 5161

Construction of Line by Guyandot & Tug River R. R. Co.

Finance Docket No. 4818

Proposed Construction of Lines by Chesapeake & Ohio Ry. Co.

Order

[fol. 286] Upon further consideration of the record in the above-entitled proceedings, of the further petition of the Chesapeake & Ohio Railway Company for reconsideration and reargument, and of the joint reply of the Norfolk & Western Railway Company and the Guyandot & Tug River Railroad Company to said petition:

It is ordered, That said petition be, and it is hereby denied.

It is further ordered, That the order entered herein on October 20, 1928, so far as it postpones to November 22, 1928, the effective date of the certificate and order issued July 23, 1928, authorizing, among other things, the Guyandot & Tug River Railroad Company to construct a line of railroad from Wharncliffe to Gilbert, in Wyoming and Mingo Counties, W. Va., and it is hereby, vacated and set aside.

And it is further ordered, That the certificate and order issued herein on July 23, 1928, so far as it authorizes the Guyandot & Tug River Railroad Company to construct a line of railroad from Wharncliffe to Gilbert, W. Va., shall take effect and be in force from and after the date of this order.

By the commission.

George B, McGinty, Secretary. (Seal.)

Condensed Statement of Testimony Given in Open Court at the Trial

R. S. MARSHALL was called as a witness on behalf of the Chesapeake, and having been duly sworn, testified as follows:

I am Vice-President of the Chesapeake. I was a witness on behalf of the Chesapeake before the Commission in Finance Docket 4818.

If we assume that shipments of coal were delivered by the Virginian to the Chesapeake at Gilbert, such shipments having been brought there over the new line of the Virginian between Itmann and Gilbert, and that the Chesapeake were to haul that coal to a western destination, I would estimate that the net income of the Chesapeake on shipments of that character would be, on the average, not [fol. 287] less than twenty cents per ton.

Cross-examination:

The estimate of net income that the Chesapeake might make out of the coal movement just described is the basis of the Chesapeake's claim of irreparable damage. It contemplates a movement over the Norfolk's line of 2,250,000 tons which would move via the Chesapeake if the Gilbert-Wharncliffe line were not built. This is substantially less than the volume now moving over existing routes of the Norfolk from the Virginian.

Redirect examination:

My estimate of $450,000 as the annual injury which would be inflicted upon the Chesapeake by the construction of the Norfolk's Gilbert-Wharncliffe line is based upon the assumption that the Chesapeake would get, even if the Gilbert-Wharncliffe line were built, one-half of the tonnage delivered at Gilbert, so that my estimate is intended to represent only the one-half which would move via the Gilbert-Wharncliffe line if built, but which, if that line were not built, would move via the Chesapeake. It is for this reason that my estimate of $450,000 represents a less amount than the tonnage now moving.

I. L. PYLE was called as a witness on behalf of the Chesapeake, and having been duly sworn, testified as follows:

I am Assistant Chief Engineer of the Chesapeake.

The map filed with the petition in this case, marked Exhibit No. 1, was prepared under my supervision. It is a reproduction on a small scale, except as to indications of railroads upon it, of a map which was filed in the proceedings in this matter before the Commission as Exhibit No. 10, having been made from exactly the same plat. The single addition is a dotted line between Wharncliffe and Gilbert. On the map filed as Exhibit No. 10 before the Commission, the dotted line between Gilbert and Itmann was represented in yellow dots, which was the color indicating lines of the Chesapeake. On Exhibit No. 1 with the [fol. 288] Petition, this dotted line was put on in green dashes, green being the color indicating lines of the Virginian. On Exhibit No. 1, the Norfolk's proposed line from Gilbert to Wharncliffe is indicated in red dots. The scale of Exhibit No. 1 is 1 inch for 6 Miles, and on a map of so small a scale it is impossible to make an exact representation in detail of the Norfolk's proposed line between Gilbert and Wharncliffe. Only the general direction is shown, and the purpose of putting that line on the map was principally to indicate that there was a proposed line of the Norfolk between Gilbert and Wharncliffe.

However, we did attempt to locate the proposed Gilbert-Wharncliffe line on this map as it was described by the Norfolk. On the south side of the mountain ridge between Gilbert and Wharncliffe the line is shown following Ben Creek and on the north side of that ridge following Gilbert Creek. This followed our understanding, based upon testimony offered by the Norfolk before the Commission as to the location of the line.

[fol. 289] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER APPROVING STATEMENT OF THE EVIDENCE

The foregoing Statement of Evidence, taken in connection with the Petition and Exhibits therewith, so far as ad-

mitted to be true by the Answers filed in this suit, is a true, complete and properly prepared statement of the substance of all the testimony and evidence introduced and admitted upon the trial of the above-entitled cause in the United States District Court for the Southern District of West Virginia, all particulars not essential to the decision of the question presented being omitted, and the same is hereby settled, allowed and approved as the Statement of the Evidence in the Appeal of the above-entitled cause.

Dated this 6 day of Mch., 1930.

Elliott Northcott, United States Circuit Judge.
Geo. W. McClintic, United States District Judge.
—— ——, United States District Judge.

[fol. 290] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ENLARGING TIME TO PREPARE STATEMENT ON APPEAL
Mar. 6, 1930

Good cause appearing therefor, it is ordered that the appellant may have and it is hereby allowed a further period to and including April 15, 1930 within which to prepare and lodge in the Clerk's office of this Court its statement of the evidence made up as hereinabove directed, and to file with the Clerk of this Court a præcipe on appeal in accordance with Equity Rule 75, and to docket the said appeal and file the record therein with the Supreme Court of the United States.

Dated March 6, 1930.

Elliott Northcott, Geo. W. McClintic.

[fol. 291] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTAL PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed
Feb. 27, 1930

To the Clerk of the above-entitled Court:

You will please prepare transcript of record in this cause to be filed in the office of the Clerk of the Supreme Court

of the United States for use on appeal to the Supreme Court of the United States, and you will please incorporate in such transcript the following portions of the record in this cause:

1. Petition and exhibits filed therewith;
2. Intervention of the Interstate Commerce Commission;
3. Answer of Guyandot and Tug River Railroad Company and Norfolk and Western Railway Company;
4. Answer of the United States of America;
5. Answer of the Interstate Commerce Commission;
6. Order entered on January 3, 1929;

[fol. 292] 7. Opinion of the Court;

8. Final Decree made and entered on December 14, 1929;
9. Petition for Appeal filed December 14, 1929;
10. Assignment of Errors filed December 14, 1929;
11. Order made and entered December 14, 1929, allowing appeal from Final Decree;
12. Bond on appeal from final Decree;
13. Order made and entered December 14, 1929, enlarging time until and including February 14, 1930 to prepare and lodge in the Clerk's office a Statement of the Evidence and to file therein a præcipe, and to docket the Appeal and file the record therein with the Clerk of the Supreme Court of the United States;
14. Citation issued on appeal from final Decree;
15. Notice of appeal directed to Attorney General of the State of West Virginia, filed December 23, 1929, together with acknowledgment of service thereof.
16. Notice of appeal directed to Defendants and Intervening Defendant, filed December 14, 1929, together with acknowledgment of service thereof and of copies of Petition for Appeal, Assignment of Errors, Order Allowing Appeal, and Citation;
17. Original præcipe for transcript of record filed December 23, 1929;
18. Order made and entered January 18, 1930, prescribing portions of the evidence and exhibits to be incorporated in the record on appeal and enlarging the time to and including March 15, 1930 within which to prepare and lodge in the Clerk's office the statement of the evidence made up [fol. 293] in accordance with said order, and to file therein a præcipe, and to docket the appeal and file the record therein with the Supreme Court of the United States;

19. Exhibit A, filed by said order of January 18, 1930 with the papers in the case, being memorandum filed by appellees of the specific evidence and exhibits deemed necessary to complete the original statement of the evidence filed by appellant;.

20. Exhibit B, filed among the papers in the case by said order of January 18, 1930, being the response of the appellant to appellees' memorandum next above refetred to;

21. Statement of evidence at final hearing, filed February 27, 1930, together with order approving the same; and

22. Clerk's certificate of transcript of record.

Said transcript to be prepared as required by law and the rules of the Supreme Court of the United States.

The original citation with the proof of service thereof on the Defendants and Intervening Defendant should accompany the transcript.

Dated February 27, 1930.

Herbert Fitzpatrick, Robt. B. Tunstall, Geo. H. Gardner, Thomas L. Preston, Fitzpatrick, Brown & Davis, Attorneys for Petitioner.

[fol. 294] IN UNITED STATES DISTRICT COURT

[Title omitted]

SECOND SUPPLEMENTAL PRAECIPE FOR TRANSCRIPT OF RECORD—Filed March 12, 1930

To the Clerk of the above-entitled Court:

In preparing the transcript of record in this cause to be filed in the office of the Clerk of the Supreme Court of the United States for use on appeal, pursuant to the supplemental praecipe for transcript of record filed February 27, 1930, you will please incorporate in such transcript the following additional portions of the record in this cause:

1. The motion and praecipe filed on behalf of the defendants-appellees and the intervener-appellee on January 3, 1930;

2. Order of March 6, 1930, enlarging time to and including April 15, 1930, within which to file statement of evi-

dence and præcipe, and to docket the appeal and file the record with the Supreme Court of the United States;

3. Supplemental præcipe filed February 27, 1930; and

4. This second supplemental præcipe for transcript of record.

Dated March 6, 1930.

Herbert Fitzpatrick, Robt. B. Tunstall, Geo. H. Gardner, Thomas L. Preston, Fitzpatrick, Brown & Davis, Attorneys for Petitioner.

[fol. 295] Acceptance of Service

Due service of a copy of the within Second Supplemental Præcipe is hereby admitted this — day of March, 1930.

March 6, 1930: Elmer B. Collins, Special Assistant to the Attorney General, Attorney for United States. March 10, 1930: D. Lynch Younger, Attorney for Norfolk & Western Ry. Co. March 10, 1930: Nelson Thomas, Attorney for Interstate Commerce Commission.

[fol. 296] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 297] In United States District Court

[Title omitted]

Order Enlarging Time—Filed Dec. 14, 1929

Good cause appearing therefor, it is hereby ordered that the Petitioner in the above-entitled suit may have, and it is hereby allowed, to and including February 14, 1930, within which to prepare and lodge in the Clerk's office of this Court a statement of the evidence and file with said Clerk a præcipe in accordance with Equity Rule 75 upon appeal from the decree of the above-named Court made and entered herein on the 14th day of December, 1929, and to

docket the said appeal and file the record therein with the Clerk of the Supreme Court of the United States.

Dated December 14, 1929.

Elliott Northcott, United States Circuit Judge. W. E. Baker, United States District Judge. Geo. M. McClintic, United States District Judge.

[File endorsement omitted.]

[fol. 298] In United States District Court

[Title omitted]

Order Enlarging Time—Filed Jan. 18, 1930

The appellant having, on Dec. 23, 1929, lodged in the Clerk's office of this Court a præcipe and statement of the evidence in this case and notified the appellees or their solicitors of such lodgment, and having named January 3, 1930 and the courtroom of this Court at Charleston, West Virginia, as the time and place when it would ask the Court to approve the said statement, the appellees appeared before the Court at Charleston, West Virginia, on January 3, 1930 and filed their præcipe in opposition to that filed by the appellant, and moved that the appellant be required to state in condensed form the entire transcript of the evidence and exhibits herein; but the Court overruled the said motion and directed the appellees to prepare and submit to the Court on or before January 17, 1930, a memorandum pointing out the specific evidence and specific exhibits which the appellees might deem necessary to complete the statement of the evidence so lodged by the appellant, avoiding the duplication of matter set forth in the statement so filed by the appellant, and of matter set forth in the report of the Interstate Commerce Commission in Finance Dockets Nos. 4818, 5161 and 6067, and of matter admitted by the pleadings; and the appellees excepted to the said ruling of the Court;

[fol. 298a] And thereafter, on January 17, 1930, without waiving their objection aforesaid, the appellees filed with

the Court their memorandum, a copy of which is hereby directed to be filed herein and marked Exhibit A, setting forth the specific evidence and exhibits which they deemed necessary to have included in condensed form, and the appellant likewise filed its responses to the several requests embodied in the memorandum, the statement of which responses is likewise herewith directed to be filed herein and marked Exhibit B; and thereupon, the matter being fully argued, the Court directed the appellant to include in its condensed form within the statement of the evidence all of the items set forth in the memorandum so filed by the appellees except those covered by paragraphs Nos. 6, 15, 16, 19 and 36, and except that only so much of the evidence and of Exhibit No. 26 mentioned in Items 7 and 8 should be included as relates to the year 1927, to which ruling of the Court the appellant, deeming the said matter superfluous and improper to be included under Equity Rule 75, excepted; and, upon motion of the appellant, the Court granted it the right to include any other portions of the record the inclusion of which may be necessary by reason of the inclusion of the matters embraced in the memorandum filed by the appellees and directed to be included by the Court;

And, good cause appearing therefor, it is further ordered that the appellant may have, and it is hereby allowed, a further period to and including March 15, 1930 within which to prepare and lodge, in the Clerk's office of this Court, its statement of the evidence made up as hereinabove directed, and to file with the Clerk of this Court a præcipe on appeal in accordance with Equity Rule 75, and to docket the said appeal and to file the record therein with the Supreme Court of the United States.

Dated January 18, 1930.

Elliott Northcott, Geo. McClintic.

Seen: Nelson Thomas, Attorney for Interstate Commerce Commission. D. Lynch Younger, for N. & W. Ry. Co. and Guyandot & Tug River R. R. Co.

[fol. 299] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ENLARGING TIME—Filed Mar. 6, 1930

Good cause appearing therefor, it is ordered that the appellant may have and it is hereby allowed a further period to and including April 15, 1930 within which to prepare and lodge in the Clerk's office of this Court its statement of he evidence made up as hereinabove directed, and to file with the Clerk of this Court a praecipe on appeal in accordance with Equity Rule 75, and to docket the said appeal and file the record therein with the Supreme Court of the United States.

Dated March 6, 1930.

Elliott Northcott, Geo. McClintic.

[fol. 300] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF PORTIONS OF THE RECORD TO BE PRINTED—Filed April 8, 1930.

Comes now the Appellant, in the above-entitled cause, and states the points upon which it intends to rely in its appeal from the decree made and entered on December 14, 1929, dismissing its Petition, which are particularly set forth in its Asignment of Errors and are as follows:

The United States District Court erred in making said decree and dismissing said Petition, and refusing to suspend, set aside and annul so much of the certificate and orders of the Interstate Commerce Commission complained of in said Petition as are therein prayed to be suspended, set aside and annulled—that is, so much thereof as authorize the construction and operation of a line of railroad between Wharncliffe, West Virginia, and Gilbert, West Virginia,—for the following reasons:

1. The said certificate and orders, to the extent of the authorization above referred to (to which extent they are hereinafter for convenience called "the action of the Com-

mission") are void and of no effect because the record made before the Commission contains no evidence that the present or future public convenience and necessity require or will require the construction of the line of railroad authorized by said action. (Assignment of Errors No. 2).

[fol. 251] 2. The action of the Commission is void and of no effect because the record before the Commission affirmatively proves that said construction is and will be contrary to the present or future public convenience and necessity. (Assignment of Errors No. 3.)

3. The action of the Commission is without authority at law, contrary to law, arbitrary, and void because it was based upon an erroneous conception and theory of the law, and in contravention of the Interstate Commerce Act, in that, as affirmatively appears from the report of the Commission, such action was solely based upon the naked finding that the construction thereby authorized would promote competition between carriers and assure competitive service, and was unsupported by any finding or any fact of record asserting, proving, or tending to prove that such promotion of competition or assurance of competitive service was or will be required by present or future public convenience and necessity. (Assignment of Errors Nos. 4 and 5.)

4. As appears from the opinion of the Court filed herein, the decision of the Court to the effect that there was evidence to support the action of the Commission was based upon three grounds in addition to the promotion of competition between carriers and the assurance of competitive service, to wit:

(a) That the line of railroad authorized to be constructed by the action of the Commission would originate traffic;

(b) that operating economies would result from use of said line of railroad; and

(c) that an additional western outlet and a new connection between other existing or proposed lines of railroad would be afforded;

which grounds are in fact and in law insufficient to sustain the said decision of the Court because:

[fol. 302] (a) the record wholly fails to show, and the Commission made no finding, that any present or future public convenience or necessity would be subserved by reason of any origination of traffic by said line;

(b) the record wholly fails to show, and the Commission made no finding, that any operating economies would be accomplished by said construction, and the record affirmatively proves the contrary; and

(c) the record wholly fails to show, and the Commission made no finding, that the present or future public convenience or necessity require or will require the additional western outlet or the new connection between other existing or proposed lines of railway which would be afforded by said construction. (Assignment of Errors No. 6.)

3. As appears from the opinion of the Court filed herein, the only ground of the Court's decision not hereinbefore adverted to is the asserted fact that authorization by the Commission of construction other than that authorized by the action complaint of herein was inseparable from, dependent and contingent upon, the construction herein sought to be enjoined. This asserted fact wholly fails to support in any measure the decision of the Court or the action of the Commission, because the Commission made no finding that this asserted fact was a fact and the record conclusively proves that no authorization by the Commission of construction other than that herein sought to be enjoined was in any wise inseparable from, dependent or contingent upon, the construction so sought to be enjoined. (Assignment of Errors No. 7.)

Designation of Portions of the Record to be Printed

Appellant designates as portions of the record which it thinks necessary for the consideration of the points relied [fol. 303] upon by it and, therefore, proper to be printed, the whole of the record on appeal in the above-entitled cause, except the following portions of the Statement of the Evidence:

(1) The following portions of the narrative of Witness Marshall's testimony:

(a) Beginning with line 17 on page 188 of the record on appeal and going through the word "Subdivision" in the 4th line from the bottom of page 191;

(b) Beginning with line 4 on page 192 and going through line 17 on page 205;

(c) Beginning with the 12th line from the bottom of page 206 and going through line 15 on page 235;

(d) Beginning with line 13 on page 236 and going through line 4 on page 238.

(2) The entire narrative of the testimony of Witness Wall, beginning at line 13 on page 238 and ending at line 20 on the same page.

(3) The following portions of the narrative of the testimony of Witness Crawford:

(a) Beginning at the top of page 247 and going through line 9 on page 251;

(b) Beginning with the last paragraph commencing on page 254 and going through line 11 on page 255.

Herbert Fitzpatrick, Robt. B. Lunstall, Thomas L. Preston, Attorneys for Appellant.

Dated April 7, 1930.

[fols. 304-305] Legal and timely service of the foregoing Statement of Points on which Appellant Intends to Rely and Designation of Portions of the Record to be Printed is hereby acknowledged this 8th day of April, 1930.

Elmer B. Collins, Attorney for United States of America.

Legal and timely service of the foregoing Statement of Points on which Appellant Intends to Rely and Designation of Portions of the Record to be Printed is hereby acknowledged this 8th day of April, 1930.

D. Lynch Younger, Attorney for Guyandot and Tug River Railroad Company and Norfolk and Western Railway Company.

Legal and timely service of the foregoing Statement of Points on which Appellant Intends to Rely and Designation

of Portions of the Record to be Printed is hereby acknowledged this 8th day of April, 1930.

Nelson Thomas, Attorney for Interstate Commerce Commission.

[fol. 306] [File endorsement omitted.]

[fol. 307] IN THE SUPREME COURT OF THE UNITED STATES

DESIGNATION BY DEFENDANT-APPELLEES AND INTERVENING DEFENDANT-APPELLEE OF ADDITIONAL PORTIONS OF THE RECORD TO BE PRINTED—Filed April 24, 1930

Come now the United States of America, Guyandot and Tug River Railroad Company and Norfolk and Western Railway Company, Defendant-Appellees, and Interstate Commerce Commission, Intervening Defendant-Appellee, and designate the following portions of the record which they think are material and should be printed, in addition to those parts designated by the Appellant:

(1) The following portions of the narrative of Witness Marshall's testimony:

(a) Beginning with line 17 on page 188 of the record on appeal and going through the word "Subdivision" in the 4th line from the bottom of page 191;

(b) Beginning with the 4th line on page 192 and going through line 17 on page 205;

(c) Beginning with the 12th line from the bottom of page 206 and going through line 15 on page 235;

(d) Beginning with line 13 on page 236 and going through line 4 on page 238.

[fols. 308 & 309] (2) The entire narrative of the testimony of Witness Wall, beginning at line 13 on page 238 and ending at line 20 on the same page.

(3) The following portions of the narrative of the testimony of Witness Crawford:

(a) Beginning at the top of page 247 and going through line 9 on page 251;

(b) Beginning with the last paragraph commencing on page 254 and going through line 11 on page 255.

Elmer B. Collins, Attorney for United States of America. Theodore W. Reath, Attorney for Guyandot and Tug River Railroad Company and Norfolk and Western Railway Company. Nelson Thomas, Attorney for Interstate Commerce Commission.

Legal and timely service of the foregoing designation of additional portions of the record to be printed, is hereby acknowledged this 22nd day of April, 1930.

Herbert Fitzpatrick, Robt. B. Lunstall, Thomas L. Preston, Attorneys for the Chesapeake and Ohio Railway Company, Appellant.

[fol. 310] [File endorsement omitted.]

Endorsement on cover: File No. 34,927. S. West Virginia D. C. U. S. Term No. 73. Chesapeake and Ohio Railway Company, appellant, vs. United States of America, Guyandot and Tug River Railroad Company, Norfolk and Western Railway Company, and Interstate Commerce Commission. Filed April 7, 1930. File No. 34,927.

FILE COPY

APR 22 1930

CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, *Appellant*

vs.

UNITED STATES OF AMERICA, GUYANDOT AND TUG RIVER RAILROAD COMPANY, and NORFOLK AND WESTERN RAILWAY COMPANY, *Defendant-Appellees*, and INTERSTATE COMMERCE COMMISSION, *Intervening Defendant-Appellee.*

No. 73

JURISDICTIONAL BASIS ON WHICH REVIEW ON APPEAL IS INVOKED.

HERBERT FITZPATRICK,
ROBT. B. TUNSTALL,
THOMAS L. PRESTON,
Attorneys for Appellant.

Dated April 14, 1930.

LEWIS PRINTING CO., INC., RICHMOND, VA.

IN THE

SUPREME COURT OF THE UNITED STATES

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, *Appellant*

vs.

UNITED STATES OF AMERICA, GUYANDOT AND TUG RIVER RAILROAD COMPANY, and NORFOLK AND WESTERN RAILWAY COMPANY, *Defendant-Appellees*, and INTERSTATE COMMERCE COMMISSION, *Intervening Defendant-Appellee.*

No. 796

JURISDICTIONAL BASIS ON WHICH REVIEW ON APPEAL IS INVOKED.

Comes now the appellant in the above-entitled cause and makes its statement particularly disclosing the basis on which this Court has jurisdiction to review on appeal the decree below.

(a) The statutory provision which sustains the jurisdiction is the Urgent Deficiencies Appropriations Act, approved October 22, 1913, c. 32, 38 Stat. L. 220, Code of Laws of the United States, Title 28, Section 47.

(b) The decree sought to be reviewed was made and entered December 14, 1929, and appellant presented its

application for the appeal by filing its Petition for Appeal with the court below on that date (R. 126, 127).

(c) This suit was brought pursuant to the provisions of the said Urgent Deficiencies Appropriations Act, c. 32, 38 Stat. L. 219, 220, Code of Laws of the United States, Title 28, Sections 41 (28), 42-48, inclusive, for a preliminary or interlocutory, and a final or perpetual, injunction enjoining, setting aside, annulling, suspending, and restraining the enforcement, operation, and execution of so much of a certain certificate and order of the Interstate Commerce Commission (hereinafter generally referred to as the "Commission"), issued and entered on July 23, 1928, in Finance Docket No. 5161 (R. 281-2), which was heard and disposed of together with Finance Docket No. 6067 and Finance Docket No. 4818, and so much of certain other orders subsequently entered in said proceedings (R. 283-5) and especially an order entered therein on November 1, 1928 (R. 285-6), as authorized the Guyandot and Tug River Railroad Company (hereinafter generally called the "Guyandot") to construct and operate a line of railroad from Wharncliffe, West Virginia, to Gilbert, West Virginia; and enjoining and restraining the Guyandot and the Norfolk and Western Railway Company (which owns the entire capital stock of the Guyandot except directors' qualifying shares, and is generally hereinafter called the "Norfolk"), and each of them, from constructing and operating the said line of railroad from Wharncliffe, West Virginia, to Gilbert, West Virginia, under or in pursuance of the authority or pretended authority of the orders aforesaid (R. 4).

The Guyandot is a corporation organized and existing under the laws of the State of West Virginia, and a citizen of that State and a resident of the Southern District

thereof (R. 3, 91, 97, 100). The Norfolk is a corporation organized and existing under the laws of the State of Virginia, and a citizen of that State, and a resident of the Western District thereof (R. 3, 91, 97, 100). The orders complained of relate to transportation and were entered upon the petition of the Guyandot and the Norfolk (R. 4, 91, 97, 100).

This suit was therefore properly brought in the District Court of the United States for the Southern District of West Virginia, pursuant to the provisions of the aforesaid Urgent Deficiencies Appropriations Act, c. 32, 38 Stat. L. 219, Code of Laws of the United States, Title 28, Sections 41 (28), 43, that "the district courts shall have original jurisdiction * * * of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission," and that "the venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made," with certain exceptions not applicable here.

The jurisdiction of the said district court was invoked by the filing in the office of its clerk of a written petition setting forth the facts constituting the petitioner's cause of action and specifying the relief sought (R. 2-22); the petition was duly served upon every defendant therein named; the Interstate Commerce Commission intervened as a defendant in the cause (R. 90), and answers were duly filed pursuant to said Urgent Deficiencies Appropriations Act, c. 32, 38 Stat. L. 219, Code of Laws of the United States, Title 28, Section 45 (R. 91, 97, 100): whereupon, by agreement of the parties, the cause was,

on January 3, 1929, submitted to the court for decision as on final hearing (R. 105, 108).

Pursuant to said Urgent Deficiencies Appropriations Act, c. 32, 38 Stat. L. 220, Code of Laws of the United States, Title 28, Section 47, the application was heard and determined by three judges, one of whom was a circuit judge, all of whom concurred in a final decree made and entered, as aforesaid, on December 14, 1929, denying the relief prayed by the plaintiff and dismissing the petition (R. 109, 126).

This appeal is taken pursuant to the following provisions of the enactment last above and in paragraph (a) hereof referred to:

> "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; *and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply*"

which said provisions, by reason of the nature of the case and of the ruling below, directly apply to this case and confer upon this Court jurisdiction to review on appeal the decree below.

(d) The following cases sustain the jurisdiction:

Piedmont & N. Ry. Co. v. *United States,* 50 Sup. Ct. 192, 194, decided Feb. 24, 1930;

Colorado v. *United States,* 271 U. S. 153, 159-161;

The New England Divisions Case, 261 U. S. 184, 188-9;

Dayton-Goose Creek Ry. v. *United States,* 263 U. S. 456, 474-5;

Chicago Junction Case, 264 U. S. 258, 261-2; and

Texas v. *Eastern Texas R. R. Co.,* 258 U. S. 204, 214-16.

HERBERT FITZPATRICK,
ROBT. B. TUNSTALL,
THOMAS L. PRESTON,
Attorneys for Appellant.

Dated April 14, 1930.

FILE COPY

OCT 25 1930
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA, GUYANDOT AND TUG RIVER RAILROAD COMPANY, and NORFOLK AND WESTERN RAILWAY COMPANY, *Defendant-Appellees*, and INTERSTATE COMMERCE COMMISSION, *Intervening Defendant-Appellee*.

No. 73.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

Brief for Appellant

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IN THE

Supreme Court of the United States

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, *Appellant*,

v.

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Brief for Appellant

I.

CITATION OF THE OPINION BELOW.

The opinion delivered in the court below is reported as *Chesapeake & O. Ry. Co.* v. *United States et al.*,

(*Interstate Commerce Commission, Intervener*), in 35 F. (2d) 769.

II.

STATEMENT OF THE CASE.

This suit was brought pursuant to the provisions of the Urgent Deficiencies Appropriations Act, c. 32, 38 Stat. L. 219, 220, U. S. C. A., Title 28, Sections 41 (28), 43-48, inclusive, (Appendix, pp. i-v). Its purpose is (1) to set aside and annul (a) so much of a certain certificate and order of the Interstate Commerce Commission (hereinafter generally referred to as the "Commission"), issued and entered on July 23, 1928, in Finance Docket No. 5161 (R. 239-241), which was heard and disposed of together with Finance Docket No. 6067 and Finance Docket No. 4818, and (b) so much of certain other orders subsequently entered in said proceedings (R. 241-3), and especially an order entered therein on November 1, 1928 (R. 244), as authorized the Guyandot and Tug River Railroad Company (hereinafter generally called the "Guyandot") to construct and operate a line of railroad from Wharncliffe, West Virginia, to Gilbert, West Virginia, and (2) to enjoin the Guyandot and the Norfolk and Western Railway Company (which owns the entire capital stock of the Guyandot except directors' qualifying shares, and is hereinafter generally called the "Norfolk"), and each of them, from constructing and operating the said line of railroad from Wharncliffe to Gilbert under or in pursuance of the authority or pretended authority of the orders aforesaid (R. 15-16).

Pursuant to said Urgent Deficiencies Appropriations Act, c. 32, 38 Stat. L. 220, U. S. C. A., Title 28, Section 47, the suit was heard and determined by three judges, one of whom was a circuit judge, all of whom concurred in the opinion to which reference is made above and in the decree entered on December 14, 1929, dismissing the suit, from which this appeal is taken.

The action of the Commission in authorizing construction of the Guyandot's proposed line is challenged as invalid primarily and substantially on the same legal ground—there is little or no dispute as to the facts—as that set out by Commissioner Porter in his dissenting expression (R. 58-64), which is that such construction will duplicate, at heavy cost, other entirely adequate railroad facilities without substantial result other than the creation or promotion of competition between carriers and competitive service to shippers. The Guyandot's proposed line will extend from territory heretofore served by the Norfolk into territory fully provided with efficient railroad facilities by the Virginian and appellant, and will render no substantial service which other facilities cannot render with greater efficiency and at less cost. Appellant's position is that the creation of competition through new construction of this character, far from warranting a certificate of public convenience and necessity, is inimical to the public interest and contrary to the theory and purpose of the Transportation Act of 1920, in that there are involved a waste of resources the burden of which will fall upon the public and a wasteful competition hurtful to appellant and the public alike. In short, appellant seeks to enjoin this construction upon the ground that it typifies the useless competitive railroad building which the Transportation Act was de-

signed to prevent. The issue thus presented cannot be fully appreciated without an understanding of the geographical features of the territory involved, and these will, accordingly, be here described.

A—THE GEOGRAPHY OF THE TERRITORY INVOLVED

Appellant filed as Exhibit 1 with its petition in the court below a map showing the railroads serving the coal fields of southern West Virginia, and the principal streams and mountain divides of that territory. (Side folio 24, opposite R. 16.) We believe the Court can most readily acquire a view of the groundwork of the case by inspection of this exhibit, and we have therefore inserted an enlargement thereof at the back of this brief.

It will be seen that the railroad of the appellant, indicated upon the map by a solid yellow line, enters West Virginia from the east not far from Clifton Forge and that its main line passes through Hinton, Prince, Deepwater, Charleston, Barboursville, and Kenova, thence crossing the Big Sandy River just south of Catlettsburg and following the southern bank of the Ohio River to the west. The southern West Virginia coal fields are reached principally over branch lines extending south from this main line. Of these branch lines, that extending from Barboursville southeastwardly through Logan to Gilbert, known as the "Logan Subdivision", is the most important in this case. The branch extending in a southwesterly direction from Prince down Winding Gulf to Stone Coal, known as the "Winding Gulf Branch", should also be noted.

The line of the Virginian Railway Company, generally

termed by us the "Virginian", which is shown in solid green on the map, after passing (westbound) through Roanoke, Princeton, and Matoaka, enters the New River coal fields over Clark's Gap, and at Elmore turns to the north, passing over three divides to Deepwater, on appellant's main line. Of the lateral lines of the Virginian, those significant here are the short line from Elmore to Itmann, and (connecting with it at Itmann) the Virginian line authorized by the Commission in the proceedings here under consideration. This latter line is indicated on the map by green-dashed lines.

The line of the Norfolk is shown in red. It enters the coal fields west of Bluefield and passes along Tug Fork of the Big Sandy River to the southward of the lines already described, through Welch, Wharncliffe, Williamson, and Louisa, thence following the Big Sandy River northward, crossing the line of the appellant and the Ohio River just west of Kenova, and following the north bank of that river to the west. It has various branches of which the only one necessary to be noticed here is the one extending northwardly from Bluestone Junction to Matoaka, on the Virginian's main line. *The line in red dots connecting Wharncliffe and Gilbert is the one with which this suit is concerned.*

The topographical features of the territory important in this case are: (1) the high mountain range which extends from near Huntington in a southeasterly direction, passes between Gilbert on the north and Wharncliffe on the south, and generally separates the Guyandot Valley, occupied principally by appellant's lines and to some extent by the Virginian's, from the Tug River Valley, occupied by the main line of the Norfolk (R. 59); and (2) the Guyandot River, which is followed by the pres-

ent and proposed line of the Virginian from its upper reaches to Gilbert, and thence by the appellant's Logan Subdivision, and which affords a down grade from Gilbert to Barboursville.

B—THE PROCEEDINGS BEFORE THE COMMISSION.

On May 7, 1925, appellant filed its application in Finance Docket No. 4818 for a certificate that public convenience and necessity required the construction by it of (a) an extension of its Logan Subdivision eastwardly from Gilbert to Mullens, and (b) an extension of its Winding Gulf branch from Stone Coal westwardly to Mullens (R. 32). On October 29, 1925, the Guyandot applied in Finance Docket No. 5161 for a similar certificate authorizing it to construct a line extending from a connection with the Virginian at Elmore westwardly to Gilbert and thence across the mountain divide already described a distance of 10.5 miles to Wharncliffe on the main line of the Norfolk (R. 32, 34). And on January 21, 1927, the Virginian, through its subsidiary, the Virginian and Western Railway Company, made application for certification by the Commission that public convenience and necessity required that it construct an extension of its Elmore-Itmann branch from Itmann westwardly down the Guyandot River to a connection with appellant's Logan Subdivision at or near Gilbert (R. 33).

It is thus apparent that by three several applications filed at widely varying dates each of the applicants sought authority to build substantially identical lines down the Guyandot River between Itmann and Gilbert, and that

the application of the Guyandot additionally sought authority for the line between Gilbert and Wharncliffe, which is the only line involved in this case.

No objections to the granting of any of the applications were filed except by the other applicants (R. 33). Accordingly, the Examiner before whom the hearings were had announced that, though the applications would be heard in the order in which they were filed, it ought to be stipulated that all parties could refer to any portions of any of the transcripts, which was done, and as a consequence of which each applicant presented its evidence in support of its application and in opposition to the applications of the other parties as a unit (R. 135-6).

The resulting record embraced 710 pages of testimony and 119 exhibits (R. 134), far the greater part of which, as would be expected, was exclusively devoted to the contentions of the respective applicants concerning construction of the line in the Guyandot basin which each sought authority to construct, but as to which no question arises in this suit. Only a relatively small portion of the evidence had any bearing whatever upon the Gilbert-Wharncliffe line.

On July 23, 1928, the Commission, through Division 4 thereof, consisting of Commissioners Woodlock, Porter and Farrell, filed an elaborate report which occupies 33 pages of the printed record and which reviews in great detail the facts established by the evidence (R. 31-64). Commissioners Woodlock and Farrell united in a majority finding that the public convenience and necessity required construction by the Virginian of the line in the Guyandot basin, and further that a certificate should issue authorizing the Guyandot to construct and operate that part of its proposed line which extended

from Gilbert to Wharncliffe (R. 57). Commissioner Porter, while concurring (with qualifications unimportant here) in the finding of the majority as to construction of the Itmann-Gilbert line by the Virginian, dissented from the finding of convenience and necessity for construction of the Gilbert-Wharncliffe line by the Guyandot and filed a separate expression stating the grounds of his dissent (R. 58-64).

Pursuant to the majority finding, an appropriate certificate and order was entered on July 23, 1928 (R. 239-241). The effective date of the order was from time to time postponed until October 22, 1928, pending consideration of appellant's petition for reconsideration and reargument of all the matters involved, which petition was finally denied (R. 241-243). Appellant, however, did not rest here, but filed a further petition for reconsideration and reargument of the action of the Commission *only in so far as it authorized the Gilbert-Wharncliffe line of the Guyandot;* and thereupon, on October 20, 1928, the Commission ordered :

> "That the effective date of the certificate and order issued in these proceedings on July 23, 1928, be and it is hereby, further postponed to November 22, 1928, *except in so far as said certificate and order authorizes the Virginian & Western Railway Company to construct a line of railroad in Wyoming and Mingo Counties; W. Va."* (R. 243; italics ours, and so throughout this brief except in the names of cases and where otherwise stated.)

This severance by the Commission of its action in these proceedings, whereby it left in effect authority for the Virginian's new line but suspended for reconsidera-

tion its authorization of the Guyandot's Gilbert-Wharncliffe line, assumes major importance in connection with the assigned error of the court below in holding that the Virginian's and the Guyandot's authorized lines constituted a unified project, and that the authority for the Virginian's new line was contingent upon and inseparable from authorization of the line in this suit sought to be enjoined.

The upshot before the Commission was that the further petition for reargument was finally denied (R. 244), with the result that the report of Division 4 stands as the final word from the Commission on the questions here involved.

C—THE PROCEEDINGS BELOW.

The order of the Commission finally denying a rehearing was made November 1, 1928 (R. 244). The petition herein was filed December 8, 1928 (R. 1), and the case presented and argued on January 3, 1929 (R. 78-80). On November 16, 1929, the Court rendered its opinion that the petition should be dismissed (R. 80-97), and the decree dismissing the petition was entered December 14, 1929 (R. 97). On the same day, December 14, 1929, the petition for appeal and assignment of errors were filed, and the appeal allowed and notice of appeal given (R. 97, 98, 101; 103-4). Appropriate proceedings looking to the making up of the record were then had, and terminated with the order of the court entered March 6, 1930 (R. 246-7), approving the statement of the evidence which is set forth in the printed record. The time for the appellant to docket the appeal and file the record was by successive orders (R. 102-3, 111-2, 247, 253) ex-

tended until April 15, 1930, and the statement of points relied on and the designation of the portions of the record to be printed were filed in this Court April 8, 1930 (R. 253).

D—THE RECORDS IN THE COURT BELOW AND ON APPEAL.

Asserting, as it did, among other things, that the action of the Commission complained of in its Bill was void because without substantial support in the evidence, appellant was constrained to introduce before the lower court the entire record before the Commission. At the same time, appellant believed that the report of the Commission, including the separate expression of Commissioner Porter, which in no way contradicted but in some respects supplemented the facts stated by the majority, constituted an elaborate and complete statement of all the material facts established by the evidence; and appellant expressly disavowed denial of any fact—as distinguished from conclusions drawn from the facts—stated in the report (R. 134). Appellant relied upon the Commission's own review of the facts as establishing complete want of any factual basis for its findings.

Appellees, on the other hand, extracted from the record certain testimony to which the Commission had apparently given no weight whatever, and set this up as substantially supporting the action of that body. *Thus was presented the anomalous situation that those attacking the validity of what was done by the Commission freely accepted as supported by the record every fact cited or referred to in the report, while those who were endeavoring to sustain the validity of what was done resorted*

for support to testimony so little regarded by the Commission as to escape any notice whatever in a report which bears every evidence that it purports fully to review all the significant proof.

The court below followed appellees in their excursion beyond the facts stated in the report (and admitted by appellant, as above stated) and, in sustaining the order, referred not merely to the findings of the Commission but also to certain "items of evidence" which in its judgment supported the order (R. 91-6).

The result was that the case emerged from the lower court with the issues augmented. The question was not alone whether the findings made by the Commission were adequate, but further whether the additional considerations pointed out by the court itself sustained what the Commission had done.

Having in mind its duty under Equity Rule 75, 226 U. S., Appendix, p. 23, to state the evidence for the record on appeal in simple and condensed form and to omit all parts of the record not essential to the decision of the questions presented, appellant filed a statement of the evidence which it submitted as a complete narrative of all the evidence which was not either (1) merely corroborative of the admitted facts stated in the report of the Commission, and therefore superfluous, or (2) entirely without bearing upon the findings as to the Gilbert-Wharncliffe line made by either the Commission or the court below, and therefore immaterial.

Appellees moved the court to reject the statement so filed and to require that there be brought to this Court, either in narrative form or in the exact words of the witnesses, the entire record before the Commission in Finance Dockets Nos. 4818, 5161, and 6067, without any

deletion whatever, and consequently without any regard to the duty imposed upon the parties by the rule of this Court above referred to (R. 107, 108). This motion the court below overruled and required that the statement of the evidence omit all matter merely corroborative of facts stated in the report and, for the rest, include certain evidence specified by the court itself as embracing, together with the Commission's report, all evidence material to the issues upon which this Court is called on to pass (R. 111, 112).

It thus comes about that this Court has before it a greatly reduced record, but one which the court below certifies as embracing not only every fact deemed by the Commission worthy of mention, but in addition all the evidence advanced by appellees and accepted *in toto* by the lower court as giving support to the order. Consideration of the record will establish that in this connection the lower court leaned rather to inclusion than exclusion of evidence, for, in appellant's view at least, it is not possible to perceive any relevancy in much that was required to be incorporated in the record on appeal.

E—THE QUESTIONS PRESENTED AND THE FACTS MATERIAL TO THEIR CONSIDERATION.

The issues in the case naturally group themselves about (1) the findings of the Commission, (2) the additional findings of the lower court, and (3) the decision of the court below that the Virginian's Itmann-Gilbert line and the Guyandot's Gilbert-Wharncliffe line were authorized as a unified and inseparable single project which must stand or fall as a whole.

(1) The Only Findings of the Commission—That Competition Between Carriers and Competitive Service to Shippers Will Be Created or Increased—Give No Support to the Order.

> "The construction of that part of the N. & W.'s proposed line from Wharncliffe to Gilbert would enable the N. & W. to compete with the C. & O. for westbound traffic from the Guyandot Valley, and would assure operators in the territory competitive service to the west." (R. 57.)

Comprised in this one sentence are *all the findings* of the Commission in support of the action we here seek to enjoin. We submit as a matter of law, presently to be argued, that these facts, confined as they are to the bare consideration that competition will result from the new construction authorized, and standing unsupported by any finding or evidence that such competition is or will be in the public interest, both fail to give any support to the finding that public convenience and necessity do or will require the Gilbert-Wharncliffe line and demonstrate that the action of the Commission in respect to that line can have been predicated only upon an erroneous conception of the theory and purpose of the Transportation Act of 1920 concerning new railroad construction.

It will be pertinent for the Court to consider that the Commission authorized this construction upon the naked findings referred to in the face of the following indisputable facts stated in its report, which, taken together, afford the basis for appellant's contention that construction of this line will be positively detrimental to the public interest.

(a) THE SOLE PURPOSE OF THE CONSTRUCTION AUTHORIZED ON THE PART OF THE GUYANDOT IS THE THROUGH TRANSPORTATION OF WESTBOUND COAL.

This is established by the quotation set forth on the previous page and by the following extract from the Commission's report:

> "For economy in the cost of transportation westbound coal from all of the Guyandot basin, and from a small contiguous area on the upper end of the Virginian's Winding Gulf line, should move over the proposed line [of the Virginian]. The evidence on this point is undisputed and convincing. * * * It is represented that the proportion shipped west in the first nine months of 1927 *may be taken as normal.* * * * The coal shipped west in 1927 probably included a small quantity destined to local points east of Kenova, *but this is held to be negligible, and Kenova may be taken as a common point in all routes to the west.*" (R. 38-9.)

(b) THE VIRGINIAN'S LINE FROM ITMANN TO GILBERT AND APPELLANT'S LOGAN SUBDIVISION FURNISH A DOWN GRADE AND ENTIRELY ADEQUATE ROUTE FOR THE TRANSPORTATION OF ALL WESTBOUND COAL PASSING THROUGH THE GUYANDOT VALLEY.

Speaking of the grades on this route, the Commission found that "there would be no adverse grades above Gilbert" except a 0.22 per cent limiting grade between Peach Creek and Kenova (R. 39-40).

Notwithstanding that inadequacy of appellant's line from Gilbert to the West would be perhaps the most important fact that could be adduced in support of the find-

ing that public necessity requires the alternate route afforded by the Guyandot's proposed line, the Commission, in its report, never so much as hints at the existence of any such justification. On the other hand, Commissioner Porter, supplementing the majority findings, says:

> "There is no hint in this record anywhere but that this territory is being economically and efficiently served by the Chesapeake & Ohio and the Virginian, and that these carriers have a present capacity far beyond that now required of them. Nor will the construction here authorized from Itmann to Gilbert alter the situation. *There is a splendid outlet from Gilbert to Barboursville and then to the west over the main line of the Chesapeake for the coal produced in this region.*" (R. 60.)

> "To sum up, then, we have a situation where the construction by the Virginian of this link between Itmann and Gilbert will form a splendid arrangement for traffic originating thereon as well as for some Chesapeake & Ohio coal moving eastbound to tidewater from the lower Guyandot Valley and Virginian coal moving westbound from the upper Guyandot Valley. The service will be complete and for aught we know will be fully adequate to meet the needs of shippers along the line." (R. 62-3.)

This distinct finding is strengthened by the absence, already alludetl to, of any suggestion, direct or indirect, in the report of the Commission that appellant's Logan Subdivision and its main line beyond Barboursville could not easily and efficiently transport to Kenova and points west all the traffic which could be delivered at Gilbert from the new line of the Virginian.

(c) THE PROPOSED GILBERT-WHARNCLIFFE LINE MUST CROSS A MOUNTAIN DIVIDE OVER GRADES SO HEAVY AS TO REQUIRE "DOUBLING", AND WILL INVOLVE A HEAVY COST WHICH ULTIMATELY WILL FALL UPON THE PUBLIC.

It is established by the Commission's report that the Gilbert-Wharncliffe line will extend 10.5 miles across the divide which naturally marks off the Norfolk's territory from that of the Virginian and appellant (R. 34); that leaving the Guyandot Valley a grade of 1.04 per cent will be encountered (R. 42); that trains using this line must be separated into sections through the process of "doubling" and transported piece-meal over the grade (R. 42); and that this line, thus shown to be disadvantageous from an operating standpoint, would cost $2,500,000 (R. 56).

(d) THE ROUTE VIA THE GILBERT-WHARNCLIFFE LINE WILL BE LONGER AND MATERIALLY LESS ECONOMICAL THAN THAT VIA APPELLANT'S LOGAN SUBDIVISION.

The distance from Elmore to Kenova is 151 miles via the Logan Subdivision, and 158 miles via Wharncliffe (R. 39).

Appellant claimed before the Commission that the cost of moving coal via Wharncliffe would be 90 cents a car, or 1.69 cents a ton more than via Gilbert and the Logan Subdivision, and this exclusive of interest charges on the cost of the Gilbert-Wharncliffe line (R. 42). Of this claim, the Commission found that "the C. & O.'s estimate

of 90 cents a car in favor of its own route does not appear excessive" (R. 43).

Having in mind the facts found by the majority and set forth above, Commissioner Porter compared the two routes in the following language:

> "The majority here find public necessity requires that the Norfolk & Western build 10.5 miles across this mountain ridge from Wharncliffe to Gilbert, *thus invading a territory new to it,* except for the traffic that it now receives through the Matoaka gateway, and which nature seems to have raised as a barrier against its entrance. *This construction is to be at a cost of* $2,600,000 *and will have an adverse grade as much as* 1.04 *per cent, which will require doubling by the trains in rising from the Guyandot River Valley and crossing this ridge.* There is no hint in the record anywhere but that this territory is being economically and efficiently served by the Chesapeake & Ohio and the Virginian, and that these carriers have a present capacity far beyond that now required of them. *Nor will the construction here authorized from Atmann to Gilbert alter the situation.* There is a splendid outlet from Gilbert to Barboursville and then to the west over the main line of the Chesapeake for the coal produced in this region. *From Gilbert to Barboursville, a distance of* 90.5 *miles, there are uniform and consistently favorable grades and for more than half of this distance the line is double-tracked.* From this same territory there are already three additional outlets to the west, one over the Virginian and the Chesapeake & Ohio at Deepwater; one by the Virginian and the Chesapeake & Ohio at Pemberton; and one by the Virginian and the Norfolk & Western at Matoaka. It is conceded in the record

that none of these is equal to the route through Barboursville, though in the first nine months of 1927, 45,770 cars moved via Matoaka and the Norfolk & Western. *The majority refer to the indisputable fact that it will cost 90 cents a car more to move coal over the new construction by way of Wharncliffe than over the Chesapeake & Ohio by way of Gilbert and Barboursville and this without making any allowance whatever for interest on investment or other fixed expense.* In fact, the majority, as it will be observed in their opinion, concede in referring to this new proposed route:

> *"'Its route would not be as economical for westbound traffic as a route via Gilbert and the Chesapeake & Ohio and requires building a line from Gilbert to Wharncliffe at a cost of* $2,500,000. *This line would have no immediate use except to connect the N. & W. main line with the Guyandot Valley. Ultimately it would develop some coal traffic.'"* (R. 59-60.)

(2) The Supplementary Findings Made by the Court Below.

The court below was of the opinion "that there are a number of items of evidence" showing that public convenience and necessity require the construction of the Gilbert-Wharncliffe line (R. 91). In addition to the findings of the Commission that competition between carriers and competitive service to shippers would result, the opinion enumerates the following:

> (a) "The proposed line is necessary for the development, in the future, of the coal-bearing lands tributary to such proposed line from Gilbert to

Wharncliffe on Gilbert and Horsepen Creeks." (R. 91.)

(b) "The evidence shows clearly that the Gilbert-Wharncliffe line is necessary in order to accomplish economies in operating costs in connection with traffic now moving by way of other lines of the N. & W., and that these economies cannot be accomplished without the construction of this short line." (R. 92.)

(c) "The I. C. C. was evidently of the opinion that the construction of the new short line was necessary to enable the N. & W. to participate in the coal, lumber and other traffic originating along or destined to points on the new line to be built by the Virginian from Itmann to Gilbert"—quoting the language used by the Commission in its findings as to competition, with the added expression from the report that "the N. & W. might be disposed to permit the exploitation of the lands of the Pocahontas Company, provided it receives the westbound tonnage therefrom at Wharncliffe." (R. 94.)

(d) "The I. C. C. evidently considered that the new line from Gilbert to Wharncliffe was necessary to prevent the bottling-up of the Virginian by having only one active western outlet." (R. 95.)

(e) "We are of the opinion that it is to the interest of the public * * * to have a cross line for the purpose of carrying freight and passengers of local people from one railway [the Norfolk] to the other [the Chesapeake and/or the Virginian]." (R. 96.)

In order to appraise the validity of these findings and determine whether they are supported by the record and

in turn support the action of the Commission, the Court must consider the following facts:

(a) As to Coal Traffic to Be Originated on Gilbert and Horsepen Creeks.

Inspection of Exhibit 56 (opposite R. 222) and Exhibit 54 (opposite R. 220) demonstrates that Gilbert and Horsepen Creeks lie in the Guyandot Valley, are tributary to the Guyandot River, and are readily accessible to development by either the Virginian's new line or appellant's Logan Subdivision, each of which follows the course of the Guyandot River and connects with the other at Gilbert. (See map at back of this brief.)

The coal deposits in question would have to be reached by a line up Gilbert Creek to its intersection with Horsepen Creek, and the starting point of this branch line would be at the mouth of Gilbert Creek, a point on the Virginian's new Itmann-Gilbert line and within half a mile of appellant's Logan Subdivision (Exhibit 1, opposite R. 16, whereon Gilbert and Horsepen Creeks are represented and, though not named, can be identified through cross-reference to Exhibit 56, opposite R. 222; map at the back of this brief). If developed from the Guyandot's proposed Gilbert-Wharncliffe line there would be required, not only the construction and consequent expenditure incident to that line, but also the construction of a branch line tributary to it extending five miles and costing $600,000 (R. 217).

It is evident that the Commission did not regard the coal deposits on Gilbert and Horsepen Creeks as a justification for its authorization of the Gilbert-Wharncliffe line, for it plainly stated the reasons that prompted its

action to be the purely competitive considerations already alluded to, and as to any origination of traffic by that line, contented itself with the casual observation, in the descriptive part of its report, that "ultimately it would develop some coal traffic." (R. 56).

The question here, then, is whether the existence of coal deposits on Horsepen and Gilbert Creeks is substantial, or any, evidence of public convenience and necessity for the Gilbert-Wharncliffe line, in view of the material facts that these deposits can be reached with far greater facility from either appellant's existing line or the new line of the Virginian than from the main line of the Norfolk, and that both the former lines, by avoiding necessity for crossing the mountain divide and by affording a shorter route to all common points, offer substantial economies the burden of the loss of which will ultimately fall upon the public, and this even without reference to the expenditure involved in the construction of the Gilbert-Wharncliffe line itself.

(b) As to Operating Economies.

Certain historical facts are pertinent in this connection. The Virginian, which was built primarily to handle eastbound coal only (R. 53), sought from the outset to avoid publication of westbound through rates for any coal originating on its line, and when ordered by the Commission to place such rates in effect (*Wyoming Coal Co.* v. *Virginian Rwy. Co.*, 96 I. C. C. 359), it attempted to comply by publication in connection with the Norfolk only. In proceedings which, in certain of their phases, came before this court for review and were here affirmed (*Wyoming Coal Co.* v. *Virginian Rwy. Co.*, 98

I. C. C. 489; *Virginian Rwy. Co.* v. *United States*, 272 U. S. 658), the Commission required the Virginian to establish through rates to the west via appellant's line as well as that of the Norfolk; but before this came to be done the movement of Virginian coal westbound via Matoaka and the Norfolk had already developed as a result of the absence of through rates via appellant's line, and such movement still continues in considerable volume (R. 237-8).

The record establishes that the proposed route via Wharncliffe and the Norfolk would be more economical than the Matoaka route by 14 cents a ton (R. 42), but also that the route via Gilbert and appellant's Logan Subdivision would exceed in economy the Norfolk's proposed Wharncliffe route by 90 cents a car exclusive of fixed charges and interest on construction cost (R. 42, 43). The significance of these facts should be emphasized. It is of course apparent that the Gilbert-Wharncliffe route for westbound coal can be used only in connection with the new line of the Virginian from Itmann to Gilbert. The superior economy of the Gilbert-Wharncliffe route over the Matoaka route is thus rendered possible solely by this new construction of the Virginian's. But this construction also and necessarily brings into existence a *third* route, via the Logan Sub-division, which is more economical than either the present route via Matoaka or the proposed Gilbert-Wharncliffe route; so that, in appellant's view, the phenomenon thus is presented that the same construction—the Itmann-Gilbert line—which, under different facts, might bring justification to the proposed Gilbert-Wharncliffe line operates simultaneously to deny that justification.

There are twenty-seven mines in the territory about

Itmann that are served jointly by the Virginian and appellant (R. 171). These mines can ship coal to the west either via the Virginian-Matoaka-Norfolk route or via appellant's line through Prince and Deepwater (R. 171). During the first nine months of 1927, 971,885 tons, constituting 43.84% of all shipments, moved from these joint mines via appellant's Deepwater route (R. 172), and the record is innocent of any evidence either (1) that the two-line haul via Wharncliffe is any more economical than the one-line haul via Deepwater, or (2) that appellant would refuse to make through rates from these mines via the Virginian's new Itmann-Gilbert line and its own Logan Subdivision.

The question here, therefore, is whether the Gilbert-Wharncliffe line can be validly authorized because furnishing a route more economical than the Norfolk's Matoaka route, when every ton of coal that now uses the Matoaka route and could use the Wharncliffe route, could also use either the route via Gilbert and the Logan Subdivision (which is proved to be more economical than the Wharncliffe route) or the Deepwater route (which is not shown to be less economical than the Wharncliffe route).

(c) As to Exploitation of Pocahontas Coal.

The Norfolk owns all of the capital stock of the Pocahontas Coal Company, which is the owner of 365,000 acres of coal lands (R. 51), 82,500 of which lie in the Guyandot Valley (R. 56).

The main purpose of the Norfolk in acquiring the holdings of the Pocahontas Coal Company was the suppression of competition on the part of other railways in

the Pocahontas field by enabling the Norfolk, so far as possible, to see to it that these areas should be served by it and not by any competing carrier (R. 207-8).

In its report, the Commission remarked that "the N. & W. might be disposed to permit the exploitation of the lands of the Pocahontas Company, provided it received the westbound tonnage therefrom at Wharncliffe" (R. 57).

There is no evidence that exploitation of the Pocahontas reserves would be in the public interest, and the Norfolk itself, as the Commission stated in its report, suggested on brief "that the Commission might properly find that there is no present necessity to construct any of the proposed lines, since the bituminous coal industry is now suffering from over-development" (R. 46).

Some part of the Pocahontas lands are already under development, though not served by the Norfolk (R. 37).

Here the question is whether any substantial support for issuance of a certificate of public convenience and necessity can be gleaned from the fact that as a result of the construction authorized the owner of coal lands *might be disposed to permit* their exploitation, where the record is not only devoid of evidence that such exploitation is or will be required in the public interest, but also proves that exploitation of the lands in question is already in progress.

(d) As to Bottling-Up of the Virginian.

Whether, in view of the fact that the sole interest of the Virginian in its westbound traffic from the Guyandot Valley lies in the matter of divisions, new construction can be authorized in order to furnish an additional

western connection with that carrier, is a question which largely depends upon legal construction of the Transportation Act of 1920 and requires for its decision no factual basis except the general rail situation already described.

(e) As to Necessity for a Cross-Line.

The court below, in its opinion, pointed out that there is no cross-line in West Virginia between the line of the Norfolk, lying south of the mountain divide already described, and the lines of the Virginian and appellant, situated on the north of the divide, and concluded "that it is to the public interest within that long distance to have a cross-line for the purpose of carrying freight and passengers of local people from one railway to the other without the necessity of making these long hauls to the Ohio River on one railway and then back up the other when the distance between these railways in these two valleys is so short" (R. 96).

In this finding the court imported a function for the Gilbert-Wharncliffe line which was not ascribed to it by either its proponent or the Commission. In determining whether this finding gives any support to the action of the Commission, this Court must determine whether the finding has any support in the record. This requires consideration of the facts (1) that the Commission found shipments of coal to local points east of Kenova to be negligible (R. 38-9), (2) that the record fails to disclose the existence of any movement of either passengers or merchandise from one valley to the Ohio and thence back to the other valley, and (3) that there is no evidence whatever of any need, or even request, for interchange

between the valleys by rail of either passengers or freight of any character whatever.

(3) The Finding of the Court Below That the Virginian's Itmann-Gilbert Line and the Guyandot's Gilbert-Wharncliffe Line Were Authorized as a Unified Project.

The facts requisite to a review of this finding are the following:

(a) The application of the Guyandot for authority to construct a line from Itmann to Gilbert and thence to Wharncliffe was filed October 29, 1925 (R. 33). The Virginian at first joined in this application, but on December 24, 1925, withdrew this concurrence, and more than a year later, on January 21, 1927, filed its own application for the Itmann-Gilbert line, describing the same as "a line of railroad extending from a connection with the Guyandot River branch of the Virginian Railway at or near Itmann, down the Guyandot River to a connection with the Chesapeake & Ohio at or near Gilbert," without reference to any construction proposed by the Guyandot (R. 33). The report of the Commission shows that the Virginian took the position that "the natural and economical routes for traffic from the proposed line are eastbound over the Virginian and westbound over the C. & O." (R. 47).

(b) The two applications referred to, as well as that filed by appellant, were heard together and disposed of in one report. The report is devoid of any statement that the authorization of the Virginian's line was con-

tingent upon construction of the Guyandot's line. The reason for granting the Virginian's application was stated to be that it "will insure supplying the necessary connection between the lines on the upper and lower Guyandot", thus evidently referring to the lines then in existence and mentioned in the Virginian's application and not to the Guyandot's line which it had, at that point in its report, not determined to authorize and which will lie on neither the upper nor the lower Guyandot (R. 56-7). When the report came to deal with the Guyandot line, it countenanced its construction on the ground that it would afford competition between the Norfolk and the appellant, without any reference to any dependence of the Virginian's line upon its construction.

(c) The Commission first disposed of all three applications by its order of July 23, 1928, wherein it required that the two lines be completed on or before the same date, December 31, 1931 (R. 240). The order did not show any dependence of the authority granted the Virginian upon that granted the Guyandot; and by a subsequent order of October 20, 1928, the Commission left in effect its authority for the Virginian's line, at the same time suspending for reconsideration its authority for the Guyandot's line (R. 243).

III.

SPECIFICATION OF THE ASSIGNMENTS OF ERROR TO BE URGED.

The eight Assignments of Error in this case (R. 98-101) are printed in the Appendix to this brief, pages ix-xii. All are relied upon. They challenge the validity of the authorization of the Gilbert-Wharncliffe line by the Commission upon the respective grounds stated therein, which, summarily stated, are: (1) that neither the findings of the Commission and the court nor the evidence in the record afford any substantial support for the Commission's order; (2) that the record proves the construction complained of in this suit to be contrary to the public interest and to have been authorized under an erroneous theory of the applicable law; and (3) that the decision of the court below that authority for the Virginian's Itmann-Gilbert line was contingent upon construction of the Guyandot's Gilbert-Wharncliffe line was erroneous because squarely in conflict with conclusive proof to the contrary. Accordingly, each of the Assignments is urged upon the Court on this appeal.

IV.

SUMMARY OF ARGUMENT.

(NOTE: The points embraced in divisions 3 and 4 of this summary will, in the interest of ultimate brevity, be treated in full at this point. They require discussion which would be brief in any event and cannot readily be shortened by summary statement. Moreover, their full disposition here will dispose, in the main, of all controversies having primarily to do with facts, and will leave for further argument only the principles of law upon which appellant rests its case.)

1. AN ORDER UNSUPPORTED BY SUBSTANTIAL EVIDENCE IS VOID.

A certificate of public convenience and necessity authorizing new railroad construction is void and without effect unless supported by substantial evidence that the new facilities are required by a strong and urgent public need. *Interstate Commerce Commission* v. *L. & N. R.R. Co.* (1913), 227 U. S. 88, 91-4; *Chicago, R. I. & P. Ry. Co.* v. *United States* (1927), 274 U. S. 29, 33; *United States* v. *Abilene & So. Ry. Co.* (1924), 265 U. S. 274, 288; *Chicago Junction Case* (1924), 264 U. S. 258, 265-6; *Public Convenience Application of Utah Terminal Ry.* (1922), 72 I. C. C. 89, 93-4.

2. THE COMPETITIVE CONSIDERATIONS UPON WHICH ALONE THE COMMISSION RESTED ITS AUTHORIZATION OF THE GILBERT-WHARNCLIFFE LINE GIVE NO SUPPORT TO ITS ORDER AND CAN HAVE BEEN RELIED UPON ONLY UNDER A MISCONCEPTION OF THE THEORY AND PURPOSE OF THE TRANSPORTATION ACT OF 1920.

In the enactment of the Transportation Act of 1920, 41 Stat. L. 456, U. S. C. A., Title 49, and of other laws enacted in the exercise of the power to regulate commerce between the several States, it was the purpose of Congress, as declared by this Court and heretofore recognized by the Commission, to develop and maintain for the people of the United States an adequate railroad system; and to that end it is recognized by Congress that the preservation of the earning capacity and the conservation of the financial resources of existing individual carriers are matters of national concern; that the unnecessary construction by one carrier of a line of railroad into territory already adequately served by another carrier involves a waste of these resources the burden of which will fall upon the public, and is inimical to the public interest; and that the mere securing to one carrier, by the construction of a new line of railroad, of the right to compete with another carrier, and the mere provision, by such construction, of competitive service for shippers, do not, in and of themselves, justify a finding of public convenience and necessity. This purpose of Congress is especially exemplified by the provisions of paragraphs (18)-(20), inclusive, of Section 1 of the Interstate Commerce Act, which must govern the Com-

mission in its disposition of applications for certificates of public convenience and necessity.

While it is manifestly true that construction of the Guyandot's proposed line from Wharncliffe to Gilbert across the mountain divide between those points would place the Norfolk in physical connection with the Virginian at or near Gilbert, and would, as the Commission found, enable the Norfolk to compete with appellant for westbound business from the Guyandot Valley, thus affording competitive service to shippers in that region, it is likewise true, and appears from the report of the Commission, that the Logan Subdivision of appellant, affording a down-grade to the West, is capable of handling far more economically the westbound traffic which the new line of the Virginian could deliver at Gilbert, and the record shows no request by, or need on the part of, any shipper for the competitive service which would be rendered by the Gilbert-Wharncliffe line. It is apparent, therefore, that the construction here sought to be enjoined would merely duplicate existing, adequate, and more economical facilities and would depend for its traffic upon what it could divert from appellant's superior route. Under such circumstances, the competitive considerations relied upon by the Commission, far from supporting a finding of public convenience and necessity, constitute positive reasons against authorization of the Gilbert-Wharncliffe line; for beyond the facts that competitive facilities are not necessary merely because they are competitive and that competition between carriers may result in harm to the public as well as in benefit, lies the mandate of Congress that duplication of facilities for purely competitive purposes shall cease.

(1922), 257 U. S. 563, 582, et seq.; *New England Divisions Case* (1923), 261 U. S. 184, 189-90; *Dayton-Goose Creek Case* (1924), 263 U. S. 456, 478; *Railroad Commission* v. *Sou. Pac. Co.* (1924), 264 U. S. 331, 347; *Texas & Pac. Ry.* v. *Gulf, etc., Ry.* (1926), 270 U. S. 266, 277-8; *Construction of Lines in Eastern Oregon* (1926), 111 I. C. C. 3, 45, 51; *Public Convenience Application of Utah Terminal Ry.* (1922), 72 I. C. C. 89, 93-4, *supra.*

3. THE ADDITIONAL FINDINGS OF THE COURT BELOW GIVE NO SUPPORT TO THE ORDER.

(Complete Discussion)

Authorization of the Gilbert-Wharncliffe line finds no support in the additional facts regarded by the court below as imparting validity to the action of the Commission, because—

(a) The Proposed Line Is Neither Necessary nor Convenient as a Means of Access to Gilbert and Horsepen Creek Coal.

The record proves that as a means of access to coal deposits on Gilbert and Horsepen Creeks the Guyandot's proposed line is wholly unnecessary and inconvenient,—unnecessary in that this coal can be reached from either the appellant's or the Virginian's line with equal facility, and inconvenient in that the resulting haul, traversing a mountain divide and involving a greater distance to all common points, would be uneconomical and burdensome alike to commerce and the public generally.

There can be no doubt that where the opening of nat-

ural resources is properly relied upon as an argument for the public convenience or necessity of a proposed line of railroad, there must be involved a conception of those resources as peculiarly available for development over that line. Such a conception is not possible in the light of the facts as to Horsepen or Gilbert Creek coal in relation to the Gilbert-Wharncliffe line. It cannot be persuasively urged that the public interest requires that the Norfolk build a branch line ten and a half miles long across a mountain at a cost of $2,500,000 as preliminary to building a second branch line five miles long at a cost of $600,000 in order to reach coal deposits which can be reached with infinitely less difficulty from the existing line of appellant and/or the authorized line of the Virginian, both affording shorter and far more economical routes.

The Commission itself was urged to consider the future coal traffic possibly to be developed by the Gilbert-Wharncliffe line as a consideration supporting authorization of its construction. Doubtless it was the circumstances just described which prompted the Commission not to rely upon the Gilbert or Horsepen coal deposits as justifying its certificate, but, on the contrary, to content itself with the casual statement that "ultimately it [the proposed line] would develop some coal traffic"—a statement that could probably be made with equal truth of any line constructed anywhere in or near the Guyandot or Tug River Valleys. It will not be suggested that this phrase implies that "strong and urgent public need" which constitutes the Commission's approved definition of public convenience and necessity.

(b) Operating Economies of the Proposed Line Compared With the Matoaka Route Are Irrelevant Because of the Still Greater Economies of Appellant's Line.

The operating economies afforded by the Gilbert-Wharncliffe line as compared with the Matoaka route are wholly irrelevant by reason of the fact that the route via Gilbert and appellant's Logan Subdivision affords still greater economies and is wholly adequate to transport the entire tonnage. A new railroad cannot be justified simply because there are worse routes than the one it will afford. *Non constat* but that, as in this case, there are better, adequate, and more economical routes. The superior economy of the Gilbert-Wharncliffe route over the Matoaka route can acquire relevancy only through indulgence of the assumption that the coal in question *must* move over *some* Norfolk and Western route,—an assumption grounded in fallacy, for public interest requires use of the economical and natural route and is hardly concerned with the private desire of the Norfolk to participate in this traffic. The Court will recall (ante, p. 21) that participation in this traffic by the Norfolk's Matoaka route had its genesis in the refusal of the Virginian to publish joint rates via appellant's line, and that establishment of such rates was ultimately compelled pursuant to a decision of this Court.

As for shipments from the twenty-seven mines served jointly by the Virginian and appellant, it is true that appellant has a one-line haul from these mines to the West via Deepwater and would, therefore, not be compellable to publish through rates via the Virginian's Itmann-Gilbert line and its own Logan Subdivision. There is, however, no proof that appellant would avail itself of the

short-haul provision of the Act and decline to open the new route to these mines; but even if we assume, for sake of the argument, that the interest of appellant will dictate such refusal, still we submit that there is no proof of either convenience or necessity that the Gilbert-Wharncliffe line be available to these mines.

In the first place, there is no necessity that the coal from these mines move over the Norfolk at all, for appellant's Deepwater route is available to the whole traffic, and not one syllable of testimony tends to show any economy in the two-line Virginian-Wharncliffe-Norfolk route as compared with the one-line haul over appellant's line via Deepwater. This appears conclusive, for 43.84 per cent of the coal from these joint mines already moves via Deepwater, and there is no suggestion of a reason why it all may not do so with entire conformity to public convenience and necessity.

In the second place, even if appellant *should* refuse to open the route via Gilbert and the Logan Subdivision, it would do no more than rely upon its legal right under the Interstate Commerce Act,—the same Act, be it noted, that prohibits unnecessary railroad construction. To hold new construction necessary under the Act because it will quiet apprehension that a carrier will avail itself of rights vested in it by the self-same legislation smacks of the theory that Congress would permit one provision of the law to be nullified in order to avoid the effect of a different provision of the same law.

And in the third place, the Commission, a body peculiarly acquainted with the intricacies of rate adjustments and their effect upon freight movements, did not find the joint mine situation worthy of mention as a reason supporting its action. Since all the facts concerning

these mines were urged upon that body as warranting the Gilbert-Wharncliffe line, its silence in respect thereto is a practical, if not a technical, finding against the sufficiency of these facts as support for its order.

(c) The Proposed Line Is Not Necessary to the Exploitation of Pocahontas Coal, and Such Exploitation Is Shown to Be Against Rather Than Conducive to the Public Interest.

Concerning the holdings of the Pocahontas Company in the Guyandot Valley, the court below stated that "the I. C. C. evidently reached the conclusion that by the burden of the ownership of this large body of land for this great length of time, certain rights accrued to the N. & W., and in our opinion *equity, at least,* requires agreement with such conclusion" (R. 95).

It may readily be questioned whether ownership by a carrier of coal lands acquired for the avowed purpose of *suppressing competition* can consistently be held to confer an equitable right to invasion of territory adequately served by other carriers through construction of a line authorized by the Commission solely on the ground that *competition would be created or increased.* But this question is not relevant; for plainly the court below, in suggesting that an equitable claim was conferred upon the Norfolk by the burden of the ownership of these lands, looked rather to the private interest of the Norfolk than to the interest of *the public,* which is the sole criterion under the law.

But there is no justification for the statement that the Commission attached any weight to the Pocahontas holdings. The Commission is required by law, before issuing

a certificate of public convenience and necessity, to find that the new construction *is* or *will be* required in the public interest. (Interstate Commerce Act, Sec. 1 (18)-(20)). This provision cannot be complied with by a finding of vague possibilities. Hence even if we were to concede, which we by no means do, that encouragement to the Norfolk to permit exploitation of coal reserves owned by it would be a valid reason for authorizing the proposed line, such authorization cannot be lawfully predicated upon the inconclusive suggestion that "the N. & W. *might be disposed to permit* the exploitation of the lands of the Pocahontas Company." (R. 94; italics supplied.) *Non constat* but that the N. & W. might not be disposed to permit such exploitation. Clearly this adumbration of less than a probability was not, and cannot be, considered a substantial basis for an order. In any event, the suggestion that construction of the proposed line is necessary for exploitation of Pocahontas holdings in the Guyandot Valley is disposed of by the fact (R. 37) that large acreages of those holdings are already under development though not served by the Norfolk.

But aside from this, the record signally fails to show that such exploitation of the Pocahontas reserves would be in the public interest. Rather is it suggested by the record, and the assertions of the Norfolk itself, that further development of these reserves may be contrary to the public interest. *For, as the Commission points out, the Norfolk "suggests in its brief that the Commission might properly find that there is no present necessity to construct any of the proposed lines, since the bituminous coal industry is now suffering from over-development"* (R. 46).

Addressing himself to this question, Commissioner Porter pertinently observed:

> "In this case the majority conceive, even before the Virginian's line is built, that another carrier will be 'required' in the public interest to serve this territory. In this conception they rely, not upon the claim of any prospective shipper, or shippers, but apparently upon the theory that competitive service might prove desirable and with a *hint* that construction of the line by the Norfolk & Western might induce it 'to permit the exploitation of the lands of the Pocahontas Company, provided it received the west-bound tonnage therefrom at Wharncliffe.'
>
> "On the question of competition I agree wholeheartedly with the remarks of Commissioner Woodlock in the *Oregon Case* which I have quoted. If 'exploitation' of the Pocahontas Company coal lands is to be dependent upon haulage of the coal by the Norfolk & Western, *it may be that its exclusion from this territory will have the wholesome effect of avoiding the over-production suggested by this carrier on brief as a possible reason for denying all of the applications.*" (R. 63.)

(d) The Virginian Will Not Be Bottled Up by Absence of the Proposed Line Because Its Only Interest in Westbound Traffic—Divisions—Is Controlled by the Commission.

To the contention endorsed by the court below that the Gilbert-Wharncliffe line is necessary to prevent the bottling-up of the Virginian by having only one effective western outlet, the all-sufficient answer is that the sole interest of the Virginian in its westbound traffic from the Guyandot Valley is the matter of divisions of

the through rates, and the matter of divisions is entirely in the hands of the Commission under Section 15 (6) of the Act (Appendix, pp. vii-viii), which empowers the Commission, upon its own motion or upon complaint, to prescribe just, reasonable and equitable divisions among carriers participating in the traffic. That this power is an integral and vital part of the balanced structure of governmental power whereby the Commission is enabled, among other things, to prevent unnecessary construction and at the same time forestall injustice to carriers situated as is the Virginian, is established by the *Dayton-Goose Creek Case* (1924), 263 U. S. 456, *supra*, and the *New England Divisions Case* (1923), 261 U. S. 184, *supra*, in the last-named of which, the court said:

> "Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R.R. Co.*; 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range." (p. 189.)

After thus stating the general purposes of the Act, and with specific reference to control by the Commission over divisions, the Court *related the exercise of this power to the accomplishment of these purposes*, saying:

"It is true that Sec. 12 of the Act of June 18, 1910, c. 309, 36 Stat. 539, 551, 552, which first conferred upon the Commission authority to establish or adjust divisions, did not, in terms, confer upon the Commission power to act on its own initiative. The language of the act seemed to indicate that the authority was to be exercised only when the parties failed to agree among themselves, and only in supplement to some order fixing the rates. The extent of the Commission's power was a subject of doubt; and Transportation Act, 1920, undertook by Sec. 15 (6) to remove doubts which had arisen. *But Congress had, also, the broader purpose explained above.* This is indicated, among other things, by expressions used in dealing with joint rates. By new Sec. 15 (6), p. 486, the Commission is directed to give due consideration, in determining divisions, to 'the importance to the public of the transportation services of such carriers'; just as by new Sec. 15 (3), page 485, the Commission is authorized upon its own initiative when 'desirable in the public interest' to establish joint rates and 'the divisions of such rates'." (pp. 194-5.)

Moreover, to permit construction of the Gilbert-Wharncliffe line in order to assure ample divisions for the Virginian would not be conducive to equitable divisions—for such the Commission is required in any event to prescribe—but, if it had any effect in this connection, could only be conducive to acquiescence by competing connections in divisions allowing to the Virginian more than its just proportion of through rates. And in any view, this construction would be such as was intended by the Act to be rendered unnecessary by Section 15 (6) and prevented by Section 1 (18)-(20), and would mark a reversion to the outgrown and wasteful

competitive construction completely condemned by the policy of the law as declared in the statute and announced by this Court.

(e) There Is No Evidence of Either Need or Desire for the Proposed Line as a "Cross-Line" for Local Exchange.

The holding of the court below that the Gilbert-Wharncliffe line is required in the public interest because furnishing a cross-line between the Guyandot and Tug River Valleys available for local exchange of freight and passengers, is without support in even a scintilla of evidence that any such exchange would take place, or that, if it would, the public interest requires it. Not one shipper or resident requested the new construction as a bridge for local exchange. Not one witness testified to any need for such exchange. Therefore, if the assumption is indulged that this exchange will take place, the further assumption is warranted that this need is amply cared for by other means than rail transportation.

But pure assumption cannot establish a public need commensurate with the cost of the Gilbert-Wharncliffe line. The Commission ignored this cross-line consideration, and in adopting it the lower court reached beyond anything in the evidence to adduce a reason for its decision. With due respect, we submit that a court's finding unsupported by evidence can have no greater validity than an equally unsupported finding of the Commission.

4. THE ITMANN-GILBERT LINE WAS AUTHORIZED BY THE COMMISSION INDEPENDENTLY OF THE GILBERT-WHARNCLIFFE LINE AND THE LATTER WAS REGARDED AND TREATED AS A SEVERABLE PROJECT.

(Complete Discussion)

The point mainly stressed by the lower court in its opinion is that the Itmann-Gilbert line of the Virginian and the Gilbert-Wharncliffe line of the Norfolk were regarded and authorized by the Commission as a unified project and that if the court were to enjoin the Gilbert-Wharncliffe line it would, in effect, substitute its judgment for that of the Commission and permit the creation of a rail situation never contemplated by the body vested with control of new railroad construction. That this point is without foundation in fact, the record establishes to the point of demonstration.

If it were true that the Commission predicated its authority for the Itmann-Gilbert line upon a condition that the Gilbert-Wharncliffe line be constructed, there would be an end of the case, for we do not contend that the courts may dismember a unified and interdependent construction program authorized by the Commission. But it is not true. Neither the report nor the order of the Commission so states, and the finding of the court is based upon inference only (see R. 87-9). But the inference is, as we shall see, neither natural nor reasonable, and one circumstance in particular shows it to be impossible.

It is not a natural inference. While, as the court remarked, the several applications were heard together

and disposed of in one order, nothing else was to be expected when the three applications involved substantially identical lines in the Guyandot Valley and when all parties conceded that but one should be built. While, moreover, as the court also said, the Itmann-Gilbert line and the Gilbert-Wharncliffe line were required to be completed by the same date, this neither requires nor justifies any such inference as that the Gilbert-Wharncliffe line was a prerequisite to the Itmann-Gilbert line. Specification of the same date for completion of the two lines is plainly referable to the undeniable fact that the Gilbert-Wharncliffe line (which is shorter and presumably capable of earlier completion) would be useless without the Itmann-Gilbert line and therefore need not be completed first.

But the court's inference of a unified project is not only not a *natural* one; it is not a *reasonable* one, for the following reasons:

(1) The report shows that the applications of the several companies in the several proceedings were filed independently, at widely varying times, and in each case for the purpose of securing certificates for the respective applicants (and/or their parent companies) alone (R. 32-3).

(2) The report shows that the Virginian's application was for a line *forming a connection with appellant* at or near Gilbert, no mention being made of a connection with the proposed line of the Norfolk (R. 33).

(3) The report shows that the Virginian took the position that "the natural and economical routes for traffic are eastbound over the Virginian *and westbound over the C. & O.*" and that in line with this position the Vir-

ginian suggested an exchange of trackage rights with appellant (R. 47).

(4) The report shows that the new line of the Virginian was treated as complete and sufficient in and of itself, the reasons for the grant of a certificate to it being thus summarized (R. 56-7):

> "The Virginian needs its proposed line in order to have greater independence in the matter of an outlet for westbound coal. It appears that it can have no suitable outlet to the west except down Guyandot River, and it is not desirable to put the ownership of the line through this narrow mountain valley or gorge under the control of one of its competitors. Trackage rights for overhead business would diminish, but not remove this objection. *The grant of a certificate to the Virginian will insure supplying the necessary connection between the lines on the upper and lower Guyandot at a minimum cost of construction*, and operation by the Virginian of the proposed line should tend to some economies in the cost of handling eastbound freight as compared with operation by the other applicants. Multiple operation of the line by the three applicants would not tend to economy or efficiency. The people of the local territory prefer the Virginian for reasons that appear to be sound. So far as the question of priority intervenes, the Virginian's claim appears at least as good as any others."

(5) In the event of a unified project it is customary for the order of the Commission to show the interdependence of the authorities granted. (See, for example, form of order entered in *Construction of Lines in Eastern Oregon* (1926), 111 I. C. C. 3, 58-60, *supra*.) No such indication exists here, and no one would have the

hardihood to assert that if the Norfolk declined to accept its certificate, that in favor of the Virginian would be avoided.

But we do not stop with showing the inference of a unified project to be *unnatural* and *unreasonable*. The following single fact proves it to be *impossible:*

On October 20, 1928, after having for a time postponed the effective date of its original order in its entirety, the Commission permitted its authorization of the Virginian's Itmann-Gilbert line to go into effect, at the same time continuing the suspension of its authority for the Norfolk's Gilbert-Wharncliffe line. The order reads:

> "Upon further consideration of the record in the above entitled proceedings, and of the further petition of the Chesapeake & Ohio Railway Company for reconsideration and reargument:
>
> "It is ordered, That the effective date of the certificate and order issued in these proceedings on July 23, 1928, be and it is hereby, *further postponed* to November 22, 1928, *except* in so far as said certificate and order authorizes the Virginian & Western Railway Company to construct a line of railroad in Wyoming and Mingo Counties, W. Va." (R. 243.)

It is not often that the point mainly relied upon by the lower court in its opinion can be so clearly shown to be error. The lower court says that from the facts of joint hearings, a single order, and an identical date for completion, it is inferable that the Commission authorized the Itmann-Gilbert line only if the Gilbert-Wharncliffe line be built. *But the Commission itself, in the order just quoted, says that it would permit the Virginian's line to be built whether or not the Gilbert-Wharncliffe line be built.* And there, surely, is an end of the matter.

5. THE PROPOSED CONSTRUCTION WILL INVADE THE PRIVATE LEGAL RIGHT OF APPELLANT TO PROTECTION FROM UNNECESSARY COMPETITIVE CONSTRUCTION.

Construction of the Norfolk's line from Gilbert to Wharncliffe, being without authority in law and authorized by a void act of the Commission, invades a legal right vested in appellant by the provisions of the Transportation Act of 1920 to protection from invasion of its territory and diversion of its traffic by unnecessary and wasteful competitive construction. *Piedmont & N. Ry. Co.* v. *United States* (1930), 280 U. S. 469, 478; *Chicago Junction Case* (1924), 264 U. S. 258, *supra;* and *Texas & Pac. Ry.* v. *Gulf, etc., Ry.* (1926), 270 U. S. 266, *supra.*

V.

ARGUMENT.

A—THE FINDINGS OF THE COURT BELOW.

The foregoing summary statement of the argument is respectfully submitted as sufficient in itself to demonstrate the inadequacy of the facts cited by the lower court but ignored by the Commission in its report as justification for the Gilbert-Wharncliffe line. Where those facts had to do with origination of traffic by the proposed line (Summary, Sec. 3 (a), ante, p. 32), it has been shown that the traffic in question can be more easily and economically developed by other lines. Where operating economies have been attributed to the Gilbert-Wharncliffe line, we have proved that greater economies still will result from the use of other existing and/or

authorized lines, and that this evidence is therefore irrelevant. (Summary, Sec. 3 (b), ante, p. 34) The conclusions that the finding of public convenience and necessity for the line might be postulated upon encouragement to land owners to exploit coal deposits controlled by them, or upon facilitation of local traffic exchange between the Guyandot and Tug River Valleys, have been shown to be assumptions unwarranted by any proof of public need or desire for such exploitation or such exchange. (Summary, Sections 3 (c) and 3 (e), ante, pp. 36, 41.) And as for public necessity for the line as a western outlet for the Virginian, we have shown that the appellant's line is fully adequate to transport all the traffic the Virginian could deliver at Gilbert, that the Virginian's only interest in its westbound traffic lies in divisions of through rates, and that such divisions are controlled by the Commission under provisions of law which, along with other provisions concerning new construction, go to make up that body of regulatory measures which constitutes the Transportation Act of 1920, and which purposed, *inter alia*, to prevent necessity for new construction arising from precisely such situations as that in which the Virginian finds itself. (Summary, Sec. 3 (d), ante, p. 38)

The summary statement (Sec. 4, ante, pp. 42-45) is also relied upon, without more, as establishing that the holding of the lower court that the Virginian's line and that of the Guyandot were authorized by the Commission as a unified project is erroneous for the reasons there given, and especially because squarely in the teeth of the action of the Commission itself in severing its authority for the Virginian's line from that for the Guyandot's

line, and permitting the first to take effect pending its reconsideration of the second.

B—THE FINDINGS OF THE COMMISSION.

Since, accordingly, the reasons supplied by the court to support the Commission's order fail to have that effect, the only facts which need be further considered are those upon which the Commission predicated its action, to-wit, that competition between the Norfolk and appellant will result from construction of the Guyandot's line, and that competitive service will be afforded shippers in the Guyandot Valley. That competition between carriers and competitive service to shippers will result as a necessary consequence of the invasion of appellant's proper territory by the line of another carrier is quite undeniable; and it follows from this that appellant's case depends, from this point, upon no controverted matters of fact, but upon the following propositions of law: (1) an order of the Commission authorizing new construction is void unless supported by substantial evidence (Summary, Sec. 1, ante p. 29); (2) competition between carriers, and competitive service to shippers, are facts which, unaccompanied by any proof of public necessity, give no support to a certificate of authority for new construction, and an order can be based solely upon these facts only under an erroneous conception of the applicable law (Summary, Sec. 2, ante p. 30); and (3) the invasion of appellant's territory and the diversion of appellant's traffic by new construction not validly authorized impinges upon the private right of appellant to protection from purely competitive construction not required in the public interest (Summary, Sec. 5, ante p. 46).

1—The Action of the Commission in Authorizing Construction of the Gilbert-Wharncliffe Line Is Void Unless Supported by Substantial Evidence.

That the law imperatively requires, in order to give validity to an order of the Commission, not merely some evidence, but substantial evidence in support thereof, is made certain by decisions of this Court.

In *Interstate Commerce Commission* v. *L. & N. R.R. Co.* (1913), 227 U. S. 88, *supra,* where it was attempted to enjoin the enforcement of an order of the Commission fixing rates, the government's contention was that, although a rate-making order could be entered only after a hearing had been accorded the parties, nevertheless such an order when made was conclusive upon the parties. But the Court took a different view, pointing out that "a finding without evidence is arbitrary and baseless", and observing that "if the government's contention is correct, it would mean that the Commission had a power possessed by no other official, administrative body, or tribunal under our government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat." After characterizing such power as "inconsistent with rational justice", the Court continued:

> "As these contentions of the government must be overruled, it is necessary to examine the record with a view of determining whether there was *substantial evidence* to support the order." (p. 94.)

And in *Chicago, R. I. & P. Ry. Co.* v. *United States* (1927), 274 U. S. 29, *supra,* where the Court reviewed

proceedings to fix maximum rail-and-water rates, it was said:

> "If the order of the Commission be unsupported by the evidence, it is, of course, void. *New England Divisions Case*, 261 U. S. 184, 203. But if the determination of the Commission finds *substantial support* in the evidence, the courts will not weigh the evidence nor consider the wisdom of the Commission's action." (pp. 33-4.)

No extended discussion is necessary in support of a principle universally recognized, but we may further call attention to *United States* v. *Abilene & So. Ry. Co.* (1924), 265 U. S. 274, 288, *supra*, holding that "a finding without evidence is beyond the power of the Commission", and to the *Chicago Junction Case* (1924), 264 U. S. 258, 265-6, *supra*, where the Court said that "to make an essential finding without supporting evidence is arbitrary action".

We have demonstrated already that the sole substantial consideration appearing from the evidence or found by the Commission in support of the action here complained of is the circumstance that construction of the Norfolk's proposed line will afford an additional and competitive route to the West for coal shipped from the Guyandot Valley. We shall now undertake to show that it is an erroneous conception of the law which permits new construction because of this fact alone. If in this contention our position is sound, then it is clearly past all argument that an injunction should issue upon the principle of the authorities above referred to.

2. Only Under a Misconception of the Theory and Purpose of the Transportation Act Can a Certificate of Public Convenience and Necessity for New Construction Be Based Upon a Naked Finding That Competition Between Carriers and Competitive Service to Shippers Will Result.

In its petition herein, to the end that its position in this matter might be clear to the Court, appellant alleged, *inter alia,* that in the enactment of the Transportation Act of 1920, and particularly of paragraphs (18)-(20) of section 1 of the Interstate Commerce Act, it was the purpose of Congress, as declared by the Supreme Court and heretofore recognized by the Commission, to develop and maintain for the people of the United States an adequate railroad system; and that to this end it was recognized by Congress that the preservation of the earning capacity and the conservation of the financial resources of existing individual carriers are matters of national concern; that the unnecessary construction by one carrier of a line of railroad into territory already adequately served by another carrier involves a waste of these resources, the burden of which will fall upon the public, and is inimical to the public interest; and that the mere securing to one carrier by the construction of a new line of railroad, of the right to compete with another carrier, and the mere provision, by such construction, of competitive service for shippers, do not in and of themselves justify a finding of public convenience or necessity in respect of such new construction.

In appraising these allegations it is pertinent to have in mind the development leading to the enactment of the Transportation Act, concisely described as follows by

Mr. Chief Justice Taft, speaking for a unanimous Court in *Wisconsin R.R. Comm.* v. *C. B. & Q. R.R. Co.* (1922), 257 U. S. 563, *supra:*

"The Interstate Commerce Act of 1887, 24 St. 379, was enacted by Congress to prevent interstate railroad carriers from charging unreasonable rates and from unjustly discriminating between persons and localities. The railroads availed themselves of the weakness and cumbrous machinery of the original law to defeat its purpose, and this led to various amendments culminating in the amending Act of 1910, 36 Stat. 539, in which the authority of the Commission in dealing with the carriers was made summary and effectively complete. Whatever the causes, the fact was that the carrying capacity of the railroads did not thereafter develop proportionately with the growth of the country, and it became difficult for them to secure additional investment of capital on feasible terms. When the extraordinary demand for transportation arose in 1917, the Congress and the President concluded to take over all the railroads into the management of the Federal Government, and by joint use of facilities, which the Anti-Trust Law was thought to forbid under private management, and by use of Government credit, to increase their effectiveness. This was done by appropriate legislation and executive action under the war power. From January 1, 1918, until March 1, 1920, when the Transportation Act went into effect, the common carriers by steam railroad of the country were operated by the Federal Government. Due to the rapid rise in the prices of material and labor in 1918 and 1919, the expense of their operation had enormously increased by the time it was proposed to return the railroads to their owners. The owners insisted that their properties could not be turned back to them by the Government

for useful operation without provision to aid them to meet a situation in which they were likely to face a demoralizing lack of credit and income. Congress acquiesced in this view. The Transportation Act of 1920 was the result." (pp. 582-4.)

Describing in a general way the purposes of the Act, the Chief Justice, after stating that Congress sought to avoid the accrual of excessive incomes to the carriers better circumstanced by recapturing and using the excess for loans to the others and for other purposes, pointed out that the Act further put under the control of the Commission, "1st, the issuing of future railroad securities by the interstate carriers; 2nd, the regulation of their car supply and distribution and the joint use of terminals; and 3rd, *their construction of new lines,* and their abandonment of old lines". (p. 585.) Continuing, the opinion was expressed in the following significant language:

"It is manifest from this very condensed recital that the act made *a new departure. Theretofore,* the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, *and the only provisions of the law that inured to the benefit of the carriers* were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. The new measure imposed *an affirmative duty* on the Interstate Commerce Commission to fix rates and *to take other important steps to maintain an adequate railway service for the people of the United States.* This is expressly declared in Sec. 15a to be one of the purposes of the bill." (p. 585.)

The general purposes of the Transportation Act are unequivocally stated in the Act itself, thus: to enable the carriers "properly to meet the transportation needs of the public," 41 Stat. L. 491; to give due consideration to "the transportation needs of the country * * * and the *necessity* * * * of enlarging [transportation] facilities," 41 Stat. L. 488; to "best meet the emergency and serve the public interest," 41 Stat. L. 477; to "best promote the service in the interest of the public and the commerce of the people," 41 Stat. L. 476-7; "that the public interest will be promoted," 41 Stat. L. 482. (See *New England Divisions Case* (1923), 261 U. S. 184, *supra*, at p. 189, footnote 6.)

And these purposes have been plainly declared by this Court in a number of cases now to be considered. In the *New England Divisions Case*, just referred to, where Mr. Justice Brandeis delivered the opinion of the Court, it was recited:

> "Transportation Act, 1920, introduced into the Federal legislation a new railroad policy. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R.R. Co.*, 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range." (pp. 189-90.)

In the *Dayton-Goose Creek Case* (1924), 263 U. S.

456, *supra*, where the constitutional validity of the recapture clause of the Transportation Act was upheld in an opinion by Mr. Chief Justice Taft, the Court, after citing *Wisconsin R.R. Comm.* v. *C. B. & Q. R.R. Co.* (1922), 257 U. S. 563, *supra*, and the *New England Divisions Case* (1923), 261 U. S. 184, *supra*, said:

> "In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, *their construction of new lines*, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged." (p. 478.)

The following language from *Railroad Commission* v. *Sou. Pac. Co.* (1924), 264 U. S. 331, *supra*, is likewise pertinent:

> "The purpose of Congress to *prevent interstate carriers from incurring expense which will lessen*

their ability to perform well their interstate functions is further shown in Sec. 439 of the Transportation Act, whereby the Interstate Commerce Act is amended by insertion of Sec. 20a. This new section subjects to the approval or rejection of the Interstate Commerce Commission the issue by an interstate carrier of all future shares of stock, bonds or other evidence of indebtedness and forbids approval unless the Commission shall find that their issue is for a lawful purpose, is compatible with the public interest, is appropriate and necessary to the discharge of its public duty as a common carrier and will not impair its ability to perform that service. This is of course *in pari materia* with the restriction of paragraph 21 of Sec. 402 to prevent a possible impairment of the financial ability of interstate carriers to discharge their interstate commerce duties." (p. 347.)

The foregoing authorities leave no room for doubt that Congress, in adopting the Transportation Act, radically departed from the policy of the past and imposed upon the Commission the broad duty so to supervise the carriers of the country as to foster an adequate transportation system, viewed from a national standpoint. Conforming to constitutional requirements, Congress set forth in the Act the general principles to be followed by the Commission in attaining this object. In general terms, as said in the *New England Divisions Case* (1923), 261 U. S. 184, *supra*, the Commission is to supervise security issues, car supply and distribution, joint use of terminals, divisions of joint rates, abandonment of old lines, and construction of new lines of railroad. All of these duties are to be discharged with an eye single to the broad purposes of the Act. And with

specific reference to the power to control new railroad construction, the duty of the Commission—which limits its power—is to recognize that only necessary construction which fills a genuine public need should be permitted. It will not suffice that the new construction may increase the revenue, or generally serve the interests of any particular carrier. The transportation system as a whole must be benefited by any construction properly authorized. And it must always be recognized that construction of lines not necessary in the general public interest—however much it may enhance the prospects of a given carrier—involves a waste of financial resources, the burden of which will, in the end, fall upon the public.

These principles—which are fully sustained by the Act itself and by the cases presently to be cited—are to an unusual and peculiar degree applicable in this case, where, we submit, is presented an instance of the very kind of construction which the Act was intended to prevent. Here we have to do with a rugged, sparsely settled country, where the only traffic of real importance is freight, and the freight traffic predominantly in a single commodity, coal. This traffic, as the Commission itself has found, will be economically and adequately cared for by the Virginian's new line and the existing lines of the Virginian and appellant—the only two carriers who have heretofore served this territory. It being found as a fact that all the traffic can readily move by the lines in the Guyandot Valley itself, it is difficult on the face of it to conceive that construction new of an additional line penetrating from other territory could be in the public interest. But when we add that the new line must cross a mountain with grades so steep as to require "doubling", that its cost will approximate $2,500,000, and that op-

eration over it will involve expense greatly in excess of that incurred over existing routes, it becomes manifest that this construction is peculiarly of the character which the Commission, so far from authorizing, was required by law to forbid.

Completely controlling is *Texas & Pac. Ry.* v. *Gulf, etc., Ry.* (1926), 270 U. S. 266, *supra*. There the Santa Fe sought to construct a new line into an industrial district near the city of Dallas, Texas. The district was not theretofore reached by any of its lines, but was being adequately served by the Texas & Pacific. Essentially, therefore, the case is on all fours with this case. The opinion of the Court, which was written by Mr. Justice Brandeis, is almost literally applicable here, and certainly declares the principles controlling in this controversy. We, therefore, invite the closest scrutiny of the following extracts:

> "A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; *that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public*

which ultimately bears the loss. See *Railroad Commission* v. *Chicago, Burlington & Quincy R.R. Co.*, 257 U. S. 563; *The New England Divisions Case*, 261 U. S. 184; *The Chicago Junction Case*, 264 U. S. 258; *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331. The Act sought, among other things, to avert such losses." (pp. 277-8.)

We especially emphasize the statement that "competition between carriers may result in harm to the public as well as in benefit", for within the limits of that one declaration is confined the complete refutation of the theory upon which the Commission acted in this case. Obviously if competition may result in harm to the public, then the bare fact that new construction will afford competitive facilities could not, in the nature of things, demonstrate that the new construction is required by public convenience and necessity. And yet, as we have shown, this is the only consideration upon which the Commission grounded its action here complained of.

We quote further from the opinion of the Court:

> "But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. *For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest.*" (p. 278.)

Relating the *Texas and Pacific Case* to the instant controversy, Commissioner Porter, in his dissenting expression, made the following accurate observations:

"I am unable to distinguish the facts and the law here under consideration from that dealt with by the Supreme Court of the United States in *Texas & Pac. Ry. v. Gulf, etc., Ry., supra.* It will be recalled that in that case the Santa Fe wished to build a line into an industrial district, 2½ miles west of the city of Dallas, Texas, theretofore not reached by any of its lines but which was being served by the Texas & Pacific. In that case the Santa Fe was seeking to build into new territory, adequately and efficiently served by another carrier. Here the Norfolk & Western is seeking to build into new territory, adequately and efficiently served by other carriers. There, they sought to build a line 7½ miles in length, involving but two small trestles and numerous ordinary fills and cuts. Here they seek to build 10½ miles over a high mountain ridge. There they sought to build at a cost of $500,000. Here they seek to build at a cost of $2,600,000. Here the majority hold that, for competitive reasons, the line may be built. As for me, I prefer to follow the reasoning of the Supreme Court and our own holdings, and deny this construction." (R. 64).

The Commission itself has, in the most striking fashion, demonstrated that it was the purpose of the requirement for certificates of public convenience and necessity to prevent the construction of new railroad facilities solely for competitive purposes. From the 32d Annual Report of the Commission to Congress, dated December 1, 1918, it appears that it was the Commission itself which urged upon Congress the enactment into law of the principle embodied in the requirement of certificates of public convenience and necessity. Thus on page 2 of the Report, the Commission said that "whatever line or policy is determined upon, the fundamental

aim or purpose should be to secure transportation systems that will be adequate for the nation's needs even in time of national stress or peril and that will furnish to the public safe, adequate and efficient transportation at the lowest cost consistent with that service. To this end there should be provisions for * * * (3) *limitation of railway construction to the necessities and convenience of the government and of the public*, and assuring construction to the point of these limitations."

And in the course of hearings before the Committee of the House of Representatives on Interstate and Foreign Commerce held just prior to the return of the railroads to private ownership, when the provisions afterwards incorporated in the Transportation Act were under consideration, Mr. Edgar E. Clark, then a member of the Commission and its representative in this connection before Congress, was called upon by the Committee to express his views concerning the purposes of the proposed enactment. With specific reference to what was afterwards incorporated as section 1 (18)-(20) of the Act, he said to the Committee:

> "The next new provision begins in line 24 on page 8. * * * This is a provision that from and after a date to be fixed by the Congress—
>
> > no carrier by railroad subject to this act shall undertake the extension of its line of railroad or the construction of a new line of railroad, or shall acquire or operate any line of railroad or extension thereof, or shall engage in transportation under this act over or by means of such line of railroad or extension thereof unless it shall first obtain from the Commission a

certificate that the present or future public convenience and necessity require or will require such construction and operation.

"This is followed by a like provision that no carrier by railroad subject to this act shall abandon any portion or all of its line of railroad, or the operation thereof, unless it shall first obtain from the Commission a similar certificate. This is carrying into this act the very well-known provision that applies in some other countries and in some of our States, commonly called the certificate of convenience and necessity. This probably is not as important as it would have been a good many years ago, and it probably will not in the future have as profound effect upon the railroad map as it would have had if it had been in effect 25 years ago; but the idea is *to prevent the building of duplicate lines of railroad* because of keen rivalry of certain financial interests or when the railroads so built will not serve the present or future convenience and necessity, and will simply *depend for traffic upon that which they can get away from railroads already built,* adding to the total burden of maintenance, capital returns, etc., which the public must pay." (Hearings, 66 Congress, p. 14.)

Mr. Clark also stated on the same occasion that:

"The principle underlying this is that a carrier, having been given a franchise to enter a field, ought to be protected against unnecessary and wasteful competition of other and rival carriers, and it ought to be required to cultivate that field to the extent that the public necessity requires." (id., p. 62.)

Commissioner Porter, referring to the finding of the Commission that the provision of a competing route of

itself justifies new construction, said that "this is new and strange doctrine for this Commission to announce as a sole reason for new construction," citing *Public Convenience Application of Utah Terminal Ry.* (1922), 72 I. C. C. 89, *supra*, and *Construction of Lines in Eastern Oregon* (1926), 111 I. C. C. 3, *supra* (R. 61, 58). In the last named case the Commission expressed the general purposes of the Act in the following language:

> "The general principles which are to guide us are not difficult to establish. Congress has undertaken to develop and maintain for the people of the United States, an adequate railroad system. It has recognized that as to individual carriers the preservation of their earning capacity and conservation of their financial resources is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources, and that the burden of this waste may fall upon the public; *that competition between carriers may result in harm to the public, as well as in benefit;* and that, when a railroad inflicts injury upon its rival it may be the public which ultimately bears the loss." (p. 45.)

Employing language specifically applicable to the case at bar, Commissioner Woodlock said in a concurring expression in the same case:

> "Congress has enjoined upon the Commission the duty of 'preserving competition' so far as possible in the grouping of railroads through consolidation. If, however, it had desired to introduce yet more 'competition' into the industry, through control in the hands of this Commission over new con-

> struction and extensions, it would doubtless have instructed us to that effect, instead of referring us to 'public convenience and necessity' as the test to be applied to new projects. 'Competition' means alternative service available to a shipper or a district; it implies existence at all times of more facilities than are actually needed to move the traffic. The law clearly contemplates that railroad plant in existence shall, as a whole, receive a 'fair return' from the rates. It is impossible, therefore, to avoid the conclusion that when Congress gave us power to govern new construction it did so with the intent that we should prohibit the building of unnecessary new facilities. New facilities become necessary when existing facilities become inadequate. 'Monopoly' is not necessarily synonymous with inadequacy. *'Competitive' facilities are not 'necessary' merely because they are 'competitive.'* Doubtless every shipper is ready at all times to welcome another railroad into his territory; doubtless every railroad is ready at all times to enter another railroad's territory and share the business that the other has developed; doubtless no railroad desires a new 'competitor'; these are all very natural states of mind. But somebody must pay for the new facilities and they must be supported by the rates." (p. 51.)

On another occasion, in *Public Convenience Application of Utah Terminal Ry.* (1922), 72 I. C. C. 89, *supra*, the Commission used language which cannot but be taken as condemning its action in the instant proceedings:

> "So long as the available supply of coal can promptly reach the consuming public over existing lines, it is difficult to perceive how public convenience and necessity can be served by the establish-

ment of competing facilities. 'Public convenience and necessity' has been defined as a 'strong or urgent public need.' *Wis. Telephone Co.* v. *Railroad Comm.*, 162 Wis. 383; 156 N. W. 614. A public need can hardly be predicated upon the demand of three shippers who may desire to introduce the element of competition in order to improve their position in their own competitive field. While one of the purposes of the Transportation Act, 1920, was to preserve competition between carriers, *the provisions of paragraphs* (18) *to* (20), *inclusive, of section* 1 *negative any presumption that it was the purpose of Congress to permit the construction of new and competitive lines of railroad where existing facilities are adequate or can be made so by the exercise of available administrative remedies.*" (pp. 93-4.)

The foregoing decisions by this Court and by the Commission, as well as the explicit terms of the Transportation Act itself, combine to demonstrate the entire accuracy of the allegations of the petition above referred to and to condemn as contrary to law and in the teeth of the purposes declared by Congress the action of the Commission complained of in this case.

3—Appellant Has Such an Interest in the Consequences of the Action of the Commission in Authorizing the Gilbert-Wharncliffe Line as to Subject It to Irreparable Injury of a Character Which the Courts Should Prevent.

It is respectfully submitted that the public wrong comprehended in the authorization of this wasteful construction involves a private wrong to appellant. It will be

remembered that over a long period of years and at great cost appellant has developed its Logan Subdivision and other lines in this territory so as to serve the traffic as it developed (R. 50). It was appellant's expectation, when conditions warranted, to connect its line to the west of Gilbert with its line in the eastern Guyandot Valley by means of construction down the Guyandot River from Stone Coal to Gilbert. But when the time came at length, not appellant, but the Virginian was granted the right to bridge the gap between the eastern and western reaches of the Guyandot. While not surrendering its belief that this involved an error by the Commission, appellant agrees that about the matter reasonably-minded men might differ. But when, in addition, a stranger to the territory is authorized to cross a mountain at great expense in order to tap the entirely adequate through line of appellant in connection with the Virginian's new line at Gilbert, and when it appears that this is permitted solely in order that the newcomer may transport at far greater cost coal which otherwise would move over appellant's line, then appellant declares it has suffered irreparable and wrongful injury which entitles it to relief at the hands of this Court.

The private right of a carrier to protection against unnecessary competitive construction arises by implication from the terms of the Transportation Act, and is fully recognized by decisions of this Court.

In *Piedmont & N Ry. Co.* v. *United States* (1930), 280 U. S. 469, *supra*, this Court refused to set aside an order of the Commission denying an application for a certificate of public convenience and necessity. The reasons were that no railroad subject to the Act has a right to extend its lines and that the order, being negative in

both form and substance, was not susceptible of violation and could not call for enforcement. In distinguishing the case from such suits as the one here, the Court, through Mr. Justice Brandeis, fully recognized the existence of the requisite legal interest of appellant, saying:

> "The case is entirely different from those cases where an application for a certificate is alleged to have been erroneously granted, as in *The Chicago Junction Case*, 264 U. S. 258, and *Colorado* v. *United States*, 271 U. S. 153. *There, a judicial review is provided in order to protect a legal right of the plaintiff alleged to have been infringed by an order which authorizes affirmative action.*" (p. 478.)

In the *Chicago Junction Case* (1924), 264 U. S. 258, *supra*, the suit was brought by a number of railroads, all competitors of the New York Central, the object of the suit being to enjoin the New York Central from acquiring, pursuant to an order of the Commission, exclusive control of terminal facilities which had theretofore been used in common by all of the parties to the suit. It was contended that the plaintiffs had not the legal interest necessary to entitle them to challenge the order. But the Court, after pointing out that in fact they had a vital interest arising out of the fact that they were competitors of the New York Central and that enforcement of the order would result in diverting a large volume of traffic from their lines to those of the New York Central, said:

> "It is true that, before Transportation Act, 1920, the Interstate Commerce Act would not have prohibited the owners of the terminal railroads from selling them to the New York Central. Nor would it have prohibited the latter company from making

the purchase. And, by reason of a provision then contained in Sec. 3 of the Interstate Commerce Act, the purchase might have enabled the New York Central to exclude all other carriers from use of the terminals. Compare *Louisville & Nashville R. R. Co.* v. *United States*, 242 U. S. 60; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 482. But Transportation Act, 1920, repealed that provision in Sec. 3; it made provision for securing joint use of terminals; and it prohibited any acquisition of a railroad by a carrier, unless authorized by the Commission. By reason of this legislation, the plaintiffs, being competitors of the New York Central, and users of the terminal railroads theretofore neutral, have a special interest in the proposal to transfer the control to that company." (p. 267.)

Without undertaking to review every decision of this Court where the legal interest of appellant is recognized, it suffices here to call attention further to *Texas & Pac. Ry.* v. *Gulf, etc., Ry.* (1926), 270 U. S. 266, *supra.* There, as has been shown, suit was brought to enjoin construction by the Santa Fe of a branch line which extended into an industrial district near Dallas, Texas, entering a neighborhood already served by the plaintiff. An injunction was awarded, and it will be observed that the only possible damage which could have accrued to the plaintiff was loss of revenue resulting from diversion of traffic which would otherwise have moved over its line.

VI.

CONCLUSION.

In conclusion, we would point again to the fact that the Commission disposed of the matter here involved

by an order which was accompanied by a very elaborate report fully reviewing the facts regarded by it as significant, and that from these facts it selected but two as supporting its authorization of the Guyandot's proposed line, to-wit, resulting competition between carriers and competitive service to shippers. Without contending that the Commission is required by law to find in its report every evidential fact upon which it rests its conclusion, we submit that where, as here, that body does in fact single out certain facts upon which it squarely predicates its action to the exclusion of all other considerations, there arises a practical presumption that what it ignored was regarded by it as unsubstantial. The additional facts advanced before and adopted by the lower court as supporting the order are either irrelevant or inconsequential, and cannot, in any sound view of the case, be regarded as furnishing substantial support for an order which must be predicated upon the existence of a *genuine public need.*

Moreover, the lower court joined the Commission in reliance upon the competitive considerations adverted to, and therefore united with the Commission in a palpable error of law. For it is not possible to see how, from the standpoint of the orderly and effective development of the law interpreting the Transportation Act and controlling its operation and enforcement, an injunction can be denied in a case of this character and the expressed intention of Congress at the same time prevail. Paragraphs (18)-(20) of Section 1 of the Act were intended to vest in the Commission supervisory power over new construction, to the end that wasteful and needless capital investment might be prevented and the public thus spared the inevitable burden which would otherwise fall

upon it. In this case it has been shown to the point of demonstration that the single purpose for which the Commission authorized the new construction involved is to afford an additional, though inferior, route to compete with existing and adequate facilities. It is impossible, within the bounds of reason, to imagine any new construction whatever connecting existing lines of railroad of which it could not be said it would furnish facilities that would provide additional competing routes. If, therefore, this Court is to withhold an injunction annulling an order of the Commission which authorizes new construction because of the single substantial fact that competition will be provided or increased by the construction, then indubitably the will of Congress will fail for want of effective application of its valid legislation.

Respectfully submitted,

HERBERT FITZPATRICK,
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Attorneys for Appellant

Richmond, Va.,
October 25, 1930.

Appendix

URGENT DEFICIENCIES APPROPRIATIONS ACT, C. 32, 38 STAT. L. 219, 220, U. S. C. A., TITLE 28, SECTIONS 41 (28), 43-48, INCLUSIVE.

"*Section* 41. (*Judicial Code, section* 24, *amended.*) *Original jurisdiction.* The district courts shall have original jurisdiction as follows:

* * * * *

"(28) *Setting aside order of Interstate Commerce Commission.* Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission. (June 18, 1910, c. 309, Sec. 1, 36 Stat. 539; Mar. 3, 1911, c. 231, Sec. 207, 36 Stat. 1148; Oct. 22, 1913, c. 32, 38 Stat. 219.)

* * * * *

"*Section* 43. *Venue of suits relating to orders of Interstate Commerce Commission.* The venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term 'destination' shall be construed as meaning final destination of such shipment. (Oct. 22, 1913, c. 32, 38 Stat. 219.)

"*Section 44. Procedure in certain cases.* The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by subdivisions 27 and 28 of section 41 of this title, and sections 20 and 43 of Title 49, shall be as provided in section 45 of this title. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States. (Oct. 22, 1913, c. 32, 38 Stat. 220; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938.)

"*Section 45.* (*Judicial Code, section 209.*) *District courts; practice and procedure in certain cases.* The jurisdiction of the district courts of cases brought under subdivisions 27 and 28 of section 41 of this title, and sections 20 and 43 of Title 49, shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served by the marshal or a deputy marshal of the district court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the secretary of the Interstate Commerce Commission and in the Department of Justice. Within thirty days after the petition is served, unless that time is extended by order of the court or a judge thereof, an answer to the petition shall be filed in the clerk's office, and a copy thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to the allegations of the petition. No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no an-

swer shall be filed as provided herein the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in the petition. The court may, by rule, prescribe the method of taking evidence in cases pending in said court. In all other respects the practice and procedure shall conform as nearly as may be to that in like cases in a district court of the United States. (June 18, 1910, c. 309, Sec. 1, 36 Stat. 539; Mar. 3, 1911, c. 231, Sec. 209, 36 Stat. 1149; Oct. 22, 1913, c. 32, 38 Stat. 219.)

"*Section 46. (Judicial Code, section 208.) Suits to enjoin orders of Interstate Commerce Commission to be against United States.* Suits to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit. (June 18, 1910, c. 309, Sec. 3, 36 Stat. 542; Mar. 3, 1911, c. 231, Sec. 208, 36 Stat. 1149.)

"*Section 47. Interlocutory injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court:* No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such appli-

cation. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit. In cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (Oct. 22, 1913, c. 32, 38 Stat. 220.)

"*Section 48. (Judicial Code, section 211.) Suits to be against United States; intervention by United States.* All cases and proceedings brought under subdivisions 27 and 28 of section 41 of this title, and sections 20 and 43 of Title 49 shall be brought by or against the United States, and the United States may intervene in any case or proceeding whenever, though it has not been made a party, public interests are involved. (June 18, 1910, c. 309, Sec. 4, 36 Stat. 542; Mar. 3, 1911, c. 231, Sec. 211, 36 Stat. 1150; Oct. 22, 1913, c. 32, 38 Stat. 219.)"

INTERSTATE COMMERCE ACT, SECTION 1 (18)-(20), 41 STAT. 1, 477-8, U. S. C. A. TITLE 49, SECTION 1 (18)-(20).

"*Sec. 1, par. (18). Extension or abandonment of lines; certificate required.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.

"*Sec. 1, par. (19). Application for certificate of commission; notice and hearing.* The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the commission may from time to time prescribe, and the

provisions of this chapter shall apply to all such proceedings. Upon receipt of any application for such certificate the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

"*Sec.* 1, *par.* (20). *Issuance of certificate by commission; unlawful extension or abandonment of lines.* The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly

authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

INTERSTATE COMMERCE ACT, SECTION 15 (6), 41 STAT. L. 486, U. S. C. A., TITLE 49, SECTION 15 (6).

"*Sec.* 15, *par.* (6). *Commission to establish just divisions of joint rates, fares, or charges; adjustments.* Whenever after full hearing upon complaint or upon its own initiative, the commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the commission shall by order prescribe the just, reasonable and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of

transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

ASSIGNMENTS OF ERROR (R. 98-101).

"In United States District Court

(Title omitted)

Assignment of Errors—Filed Dec. 14, 1929.

Comes now the Petitioner above named and presents this Assignment of Errors, and says that in the record and proceedings in the above-entitled case and the decree (hereinafter referred to as 'the decree') made and entered against it therein on the 14th day of December, 1929, there is error in the particulars hereinafter set forth, that is to say:

I.

The Court erred in making the decree.

II.

The Court erred in making the decree and dismissing the petition, because the action of the Interstate Commerce Commission, described and complained of in the Petition on file herein and hereinafter referred to as 'the action of the Commission', is void and of no effect because the record made before the Commission contains no evidence that the present or future public convenience and necessity require or will require the construction of the line of railroad in said Petition prayed to be enjoined.

III.

The Court erred in making the decree and dismissing said petition, because the action of the Commission is void and of no effect in that the record before the Commission, and the report of the Commission, affirmatively

show that said construction is and will be contrary to the present and future public convenience and necessity.

IV.

The Court erred in making the decree and dismissing said petition, because the action of the Commission is without authority at law, contrary to law, arbitrary and void in that it was based upon an erroneous conception and theory of the law, and in contravention of the Interstate Commerce Act.

V.

The Court erred in making the decree and dismissing said petition, because its action in that behalf was based upon (1) alleged reasons stated by the Commission and concurred in by the Court, and (2) alleged reasons not stated by the Commission, but nevertheless found and stated by the Court; and none of said reasons shows or tends to show any present or future public convenience or necessity for the construction of the line of which the construction is herein sought to be enjoined.

VI.

The Court erred in making the decree and dismissing said petition, in so far as its action in doing so was based upon reasons stated by the Commission, because the said reasons of the Commission and its action based thereon rested upon an erroneous conception and theory of the law and are in contravention of the Interstate Commerce Act, in that (as affirmatively appears from the report of the Commission) said reasons and action were solely based upon the naked findings that the construction thereby authorized would promote competition between carriers and assure competitive service, and were unsupported by any finding or any such fact of record asserting, prov-

ing, or tending to prove that such promotion of competition or assurance of competitive service was or will be required by present or future public convenience or necessity within the meaning of the Interstate Commerce Act.

VII.

The Court erred in making the decree and dismissing said petition, in so far as its action in doing so was based upon reasons which, though not stated by the Commission, were found and stated by the Court, because, as appears from the opinion of the Court filed herein, the only reasons, in addition to those stated by the Commission and mentioned in Assignment VI, for which the Court held the action of the Commission to be supported by the record, were:

(a) That the construction authorized by said action would originate traffic;

(b) That operating economies would be accomplished by said construction; and

(c) That an additional western outlet would be supplied and a new connection between existing or proposed lines of railway afforded;

which grounds are in fact and in law insufficient to sustain the decision of the Court because;

(a) The record wholly fails to show, and the Commission did not find, that any present or future public convenience or necessity would be subserved by reason of any origination of traffic by said construction;

(b) The record wholly fails to show, and the Commission did not find, that any operating economies would be accomplished as the result of said construction, and the record affirmatively proves not only that no operating economies would be accomplished as the result of said construction, but that the effect thereof would be to

place the burden of added operating expenses upon the national transportation system; and

(c) The record wholly fails to show, and the Commission did not find, that present or future public convenience or necessity require or will require the additional western outlet or the new connection between other existing or proposed lines of railway which would be afforded by said construction.

VIII

The Court erred in making the decree and dismissing said petition, because, as appears from its opinion filed herein, the only ground, in addition to those hereinbefore referred to, upon which the Court based its decision sustaining the action of the Commission was the Court's holding that authorization of construction other than that complained of in said Petition was inseparable from, dependent and contingent upon, the construction in said Petition sought to be enjoined; whereas, the Commission did not so find, and the record conclusively proves that no authorization of any construction other than the construction in said Petition sought to be enjoined was in anywise inseparable from, dependent or contingent upon the construction so sought to be enjoined.

Wherefore the Petitioner above named prays that the said decree entered herein on the 14th day of December, 1929, be reversed, with directions that the injunction be issued in accordance with the prayers of the said petition and that there be granted such other and further relief as may be appropriate.

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GEO. H. GARDNER,
THOMAS L. PRESTON,
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Attorneys for Petitioner."

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IN THE

Supreme Court of the United States

No. 73 of October Term, 1936.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, *Appellant*,

vs.

UNITED STATES OF AMERICA, GUYANDOT AND TUG RIVER RAILROAD COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

REPLY TO THE SUGGESTION OF COUNSEL FOR GUYANDOT AND TUG RIVER RAILROAD COMPANY AND NORFOLK AND WESTERN RAILWAY COMPANY THAT THE CASE HAS BECOME MOOT.

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THOMAS L. PRESTON,
Attorneys for The Chesapeake and Ohio Railway Company.

LEWIS PRINTING CO., INC., RICHMOND, VA.

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REPLY TO THE SUGGESTION OF COUNSEL FOR GUYANDOT AND TUG RIVER RAILROAD COMPANY AND NORFOLK AND WESTERN RAILWAY COMPANY THAT THE CASE HAS BECOME MOOT.

This suit was brought to enjoin the construction and operation of a new line of railroad. The Norfolk and Western Railway Company and the Guyandot and Tug

River Railroad Company (hereinafter together referred to as the "Norfolk"), have filed herein a paper entitled "Railway Construction Since Case Was Heard in the District Court". The paper is not otherwise characterized or described; but an examination of it reveals that it sets up a number of matters of fact not appearing in the record, many if not most of which indeed are alleged to have occurred since the case was submitted to the court below, which are adduced to show that "a change in the status has occurred since the case was presented in the District Court". No motion is made or submitted, but the question is asked: "Has the case become moot or inappropriate by the changed conditions for the exercise of the equitable power of the District Court?" (p. 2). No other question is raised, and we take it that no other is involved; nor has any similar question been raised by the United States or the Interstate Commerce Commission.

We shall refer to this paper, for the sake of convenience, as the "Norfolk's Suggestion". Its filing sharply draws attention to the unsatisfactory situation almost inevitably called into being by an informal presentation of matters of fact *dehors* the record. We raise no objection by reason of the fact that the statement is not sworn to, the fact of its being made by counsel obviating question in this regard. But since the principal factual support for the suggestion that the case has become moot is found in the assertion that the line is now more than 60% completed at a cost, as of October 20, 1930, of $1,695,000, appellant would obviously desire, and we conceive that it would be entitled to, the opportunity (1) to ascertain by cross-examination and thereby to lay before the Court (a) the reasons for such an expenditure while there is pending the question of the legality of its purposes, and

(b) if the order of the Commission is urged in justification, the reasons why no modification of that order was sought; and (2) itself to introduce evidence that would throw light upon those questions. The Norfolk's maneuver has deprived appellant of the first of these desired opportunities; as to the second, no recourse remains except the undesirable one, not sought but forced upon appellant, of going outside the record in turn to supplement the Norfolk's statement with such facts as are necessary completely to present the situation.

In the first place, there has been no change in the situation since the case was heard in the District Court except a quantitative one. The case was heard, argued, and submitted on January 3, 1929. But the Norfolk itself says in its Suggestion that construction work began prior to January 1, 1929; and, moreover, as counsel signing this Reply are informed (in response to inquiries instituted since the Norfolk's Suggestion was filed), the facts are that requests for bids were issued by the Norfolk under date of November 10, 1928, returnable November 27, 1928; that actual construction began on December 10, 1928; and that prior to the hearing in the District Court approximately 3% of the grading had been completed from Wharncliffe to the top of the mountain between that point and Gilbert, and excavation begun at or near the Gilbert end of the line.* The Norfolk offered no proof in the District Court of this commencement and prosecution of construction, but seeks now, for the first time, to procure the consideration of facts extraneous to the record, some of which were available to it and peculiarly

*The Norfolk's suggestion asserts, as to the Itmann-Gilbert line of the Virginian, that as of October 20, 1930, the line had been 50% completed at a cost of $2,300,000 (pp. 4-5). This partial construction of the Virginian's new line is without significance here, because the authority for that line is not sought to be enjoined.

within its knowledge at the time of the hearing below, and the remainder of which do no more than indicate a continuation since the hearing of a course of conduct then already begun. Without questioning the propriety of submitting to an appellate court evidence of such a change of conditions since a trial below as would render moot the question involved, we deny the right of the Norfolk here to raise points based upon facts necessarily known to it at the hearing, but not proved, and facts occurring since the hearing which merely show the continuation of a construction program then already in progress. The silence on this point of the United States and the Interstate Commerce Commission is significant.

Aside from this, however, the facts that construction of the line is not completed and that, not construction alone, but operation as well is herein sought to be enjoined (R. 15-16), preclude the possibility that the case has become moot.

The recent decision of this Court in *Texas, etc., Railroad Company* v. *The Northside Belt Railway Company* (1928), 276 U. S. 475, is so perfectly in point as to excite wonder that the Norfolk should have filed its Suggestion. That suit was instituted to prevent construction and operation of a line of railway. It appeared that prior to institution of the suit land for the right of way had been condemned, compensation awarded and paid, and the company put in possession of the land. Before process was served, the line had been partially completed. But at the time of the hearing, construction had not been completed and operation had not begun (pp. 477-8).

The District Court dismissed the bill upon the merits. The history of the case upon appeal to the Circuit Court of Appeals is described in the opinion of this Court as follows (p. 478):

"The Circuit Court of Appeals affirmed the decree of the District Court, without passing upon the merits of the case. It held that the cause had become moot, because 'the only relief prayed for was action by the court restraining the doing of things which have been done since the suit was brought.' This conclusion was based on its own finding that 'before the decree appealed from was entered, a judgment condemning said land was rendered in said condemnation suit, and appellee had constructed its railroad over said land and was operating the same.' 16 F. (2d) 782. This Court granted a writ of certiorari. 274 U. S. 734."

Disapproving the finding of the Circuit Court of Appeals, this Court said (pp. 478-9):

"The finding of fact upon which the Court of Appeals rested its judgment was clearly erroneous. There is no basis in the record for the finding that the railroad was in operation. The part of the railroad over the plaintiff's land had been constructed; but the railroad had not been completed. No part of it had been operated; and apparently it was physically impossible to operate it in interstate commerce until completed. Paragraph 20 of Sec. 402 specifically provides that unauthorized operation as well as construction may be enjoined. *Moreover, the facts erroneously found would not, if true, have rendered the case moot. For where a defendant, with notice of the filing of a bill for an injunction, proceeds to complete the acts sought to be enjoined, the court may, by mandatory injunction, compel a restoration of the status quo. Tucker* v. *Howard*, 128 Mass. 361, 363; *Town of Platteville* v. *Galena & Southern Wisconsin R. R. Co.*, 43 Wis. 493, 506-507" (Italics ours).

This decision is in line with the prior holdings of this Court in *Mills* v. *Green* (1895), 159 U. S. 651, 654, and *Southern Pac. Terminal Co.* v. *Interstate Commerce Commission* (1911), 219 U. S. 498, 514.

The doctrine of moot cases, being grounded upon the rule that the court will not do a vain thing, is so utterly inapplicable here that it is not surprising that the Norfolk refrains from arguing the point and is content merely to suggest the question as a *point d'appui* for a statement of facts extraneous to the record and foreign to this case as submitted to the court below. Their importation into the case, under circumstances of such palpable irrelevancy, cannot, whatever its purpose, influence the decision on the merits. The private right asserted by the appellant herein is parallel with, and in that sense representative of, the right of the public under the Transportation Act of 1920 to protection from the construction and operation of unnecessary, uneconomical and wasteful railroad facilities. Clearly the fact that, of the $2,500,000 which the Gilbert-Wharncliffe line will cost when completed $1,695,000 have been expended pending this appeal, cannot modify the considerations of public right and policy which underlie appellant's suit.

Certain questions, however, may ultimately arise from these considerations which are not presented upon this record, but which inevitably come to mind as the only possible result of the thrusting of the Norfolk's Suggestion upon the Court's attention. Ready answer being at hand, appellant prefers not to leave the *quæres* outstanding. The wrong to the public committed by this construction is not confined to the saddling upon it of the initial cost of construction. The expenditure of $2,500,000, stated to be the cost of the line, necessarily leads to fixed charges by way of interest and taxes. The record

further shows that operation over the Gilbert-Wharncliffe line is possible only at a cost exceeding by 90 cents a car the cost of operation over appellant's wholly adequate Logan Subdivision (R. 43). Can the Norfolk by expending $1,695,000, during the progress of a suit brought to enjoin its authority so to do, justify the further ultimate imposition upon the public of the remainder of the initial cost, together with the continuing fixed charges incident thereto, and the continuing loss involved in supporting the unnecessary and wasteful operation of the line? The question itself at once suggests a negative answer. It exposes the effort of the Norfolk in this connection as an invitation to the Court to throw the public's good money after the Norfolk's bad. And if it be suggested that the funds already expended must themselves ultimately be drawn from the public, we reply that it is a question committed to the Interstate Commerce Commission whether expenditures upon construction pending a suit to enjoin that construction are made under such efficient and economical management as to warrant their capitalization against the public by their inclusion in determining the base either for rate-making or recapture purposes (Interstate Commerce Act, Sec. 15a). In any event, the wrong complained of is not consummated, but merely begun; and the consequence is clear that this case deserves disposition upon its merits in the light of the facts shown by the record, and no others.

We would notice briefly, in conclusion (1) the statement of the Norfolk that it could not have done otherwise than proceed with construction if its rights under the Commission's Order were to be preserved, and (2) the intimation, apparently though indirectly conveyed by the

Suggestion, that appellant has not diligently pursued the legal remedies open to it.

(1) The basis of the Norfolk's statement that it could not do otherwise than it did lies in the provision of the Commission's order that work should begin on or before January 1, 1929, and be completed on or before December 31, 1931. This provision is advanced to the end that compulsion be made to justify an otherwise unwarranted disregard of the pendency of this suit. But the force of the position disappears in the light of the fact that this suit was instituted on December 8, 1928, twenty-three days before the certificate required commencement of the work. An application to the Commission, during that period, for extension of the time for commencement and, if necessary, for completion of the project, would surely have been granted, in view of the pendency of this suit, as the veriest *pro forma* affair. Without having taken this simple measure to preserve the certificate in full force and virtue with due regard to and respect for judicial process, it does not lie in the mouth of the Norfolk to say that it could not have done otherwise than it did. In the absence of any effort to be relieved of the necessity which it now pleads in justification, it must lie upon the bed it has made.

(2) The intimation that appellant has been wanting in diligence in pursuing the available legal remedies is contained in the following paragraph of the Suggestion (p. 2):

> "This case was heard, argued and submitted in the District Court January 2, 1929, and submitted to that Court by agreement of all the parties by Counsel 'for its decision as on final hearing': R. p. 80. The prayer of the petition of the Chesapeake Company for a preliminary injunction was thus aban-

doned, and no interlocutory order and injunction *pendente lite* or *supersedeas* was allowed."

In reply, appellant would point out that this suit to set aside an order of the Commission issued November 1, 1928, was instituted by petition filed December 8, 1928, wherein an interlocutory, as well as a permanent, injunction was prayed for; that no expedition could have resulted from seeking a temporary restraining order because under the District Court Jurisdiction Act, U. S. C. A., Title 28, Sec. 47, 38 Stat. L. 220, three days' notice of hearing before a three-judge court would have been requisite, as compared with five days' notice required in connection with the prayer for an interlocutory injunction—a saving of but two days, and of no consequence in view of the time necessarily to be consumed in convening the court—; and that appellant could not have obtained a temporary restraining order if prayed for, because of the findings as to irreparable damage required by the Act—that is to say, the injury to appellant here would not have been occasioned by the *beginning* of the construction, but only by its completion and the subsequent operation of the line. Submission as on final hearing merely precluded introduction of further testimony, waived nothing, and should have made rather for than against expedition in the disposal of the suit. A stay pending appeal from the final decree of the District Court refusing the injunction was precluded by the requirements of the law as to the degree of injury, and other special reasons requisite to be shown, *Virginian Ry. Co.* v. *United States* (1926), 272 U. S. 658, 673, as well as by the fact that no affirmative action by appellant to its own irreparable injury was required as a result of the decree, as was the case in *Virginian Ry. Co. v. United*

States, supra; Louisville & Nashville R. Co. v. *United States* (D. C.), 227 F. 273, Id., 242 U. S. 60; *Central R. R. of New Jersey* v. *United States*, 257 U. S. 247; *Lehigh Valley R. Co.* v. *United States*, 243 U. S. 412, and *Beaumont etc. Ry. Co.* v. *United States* (1930), 51 Sup. Ct. 1, where stays were granted by the District Court. Finally, no supersedeas was proper because the decree dismissed the bill and there was nothing to supersede. *Cumberland Tel. Co.* v. *Pub. Serv. Comm.* (1922), 260 U. S. 212, 215.

The foregoing, by disposing of the supposed omissions mentioned by the Norfolk, demonstrates that appellant has expeditiously pursued every legal remedy open to it. Those things which the Norfolk points to as left undone could not properly have been done. Furthermore, appellant did not stop with merely invoking its legal remedies. On December 8, 1928, the day this suit was instituted, it came to appellant's notice through the press that a contract for construction of the line had been awarded. On December 10, 1928, appellant mailed to the contractor a copy of its petition herein together with notice of the pendency of this suit, wherein it was stated that the suit was brought to set aside as void the Commission's authorization of the line and that, "in the view which we take of the law any contract or contracts for this construction are, for the reasons stated in the petition, likewise unlawful and void". A copy of this notice was mailed to the Norfolk. (See Appendix). It is thus abundantly clear that appellant has done all that it lawfully could do in the premises.

The extended progress of this construction in the face of the pendency of this suit seeking to set aside the only authority under which it could lawfully have been undertaken is due neither to delay on the part of appellant

nor to appellant's failure to pursue any effective remedy open to it, but is, on the contrary, to be accounted for by two things alone—the willingness of the Norfolk to risk a decision unfavorable to it, and the delay of ten months by the District Court in deciding the case. It is respectfully submitted that these circumstances, together with the abundant scope for operation of a judgment of this Court reversing the decree of the court below, dispose of the suggestion that the case has become moot and clearly entitle appellant to a decision upon the merits of the controversy in the light of the facts properly proved and shown by the record.

Respectfully submitted,

HERBERT FITZPATRICK,
ROBT. B. TUNSTALL,
THOMAS L. PRESTON,
Attorneys for The Chesapeake and Ohio Railway Company.

APPENDIX.

Richmond, Virginia,
December 10, 1928.

Messrs. W. W. Boxley & Company
and W. W. Boxley,
Roanoke, Virginia.

Dear Sirs:

You are hereby notified that on Saturday, December 8, 1928, the undersigned filed in the Clerk's Office of the District Court of the United States for the Southern District of West Virginia, a petition in equity against the United States of America, the Guyandot and Tug River Railroad Company, and the Norfolk and Western Railway Company, looking to the setting aside and annulling, to the extent set forth in the petition, of a certain certificate and orders of the Interstate Commerce Commission authorizing the construction by the Guyandot and Tug River Railroad Company of a line of railway between Wharncliffe, West Virginia, and Gilbert, West Virginia, and also seeking to enjoin the Guyandot and Tug River Railroad Company and the Norfolk and Western Railway Company from proceeding with that construction.

There is attached hereto a printed copy of the petition aforesaid, with the accompanying exhibits, from which you may see that it is the contention of the undersigned that the certificate and orders so entered by the Interstate Commerce Commission are void in so far as they authorize, or purport to authorize, the construction of this line of railroad. In the view which we take of the law any contract or contracts for this construction

are, for the reasons stated in the petition, likewise unlawful and void.

In the CHARLESTON DAILY MAIL published on the afternoon of Saturday, December 8, 1928, there appeared an article stating that the firm of W. W. Boxley & Company had been awarded a contract for the construction of this line of railroad, and in view of this fact we deem it proper to give this notice to the end that if this newspaper report be correct you may be fully advised as to the existing situation before proceeding further under the contract.

Respectfully,

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

By R. S. MARSHALL,
Vice-President.

ROBT. B. TUNSTALL,
Of Counsel.

REGISTERED MAIL.

December 10, 1928. T/b

The Chesapeake and Ohio Railway Company v. *United States of America, Guyandot and Tug River Railroad Company, and Norfolk and Western Railway Company.*

Mr. W. W. Boxley,
Boxley Building,
Roanoke, Virginia.

My dear Mr. Boxley:

I am enclosing a notice to you and the firm of W. W. Boxley & Company, which explains itself. As I have written Mr. Reath today, I regret the necessity that has compelled this Company to take this proceeding, but in the view which we take of the law, and in the light of the very great interest of this Company in the situation, no other course seems possible, and it has seemed to me at once the courteous and proper thing to advise you as promptly as possible as to the existing situation.

Very truly yours,

ROBT. B. TUNSTALL,
Assistant General Counsel.

Cc to—
Mr. Theodore W. Reath,
With copy of notice.

December 10, 1928. T/b

The Chesapeake and Ohio Railway Company v. *United States of America, Guyandot and Tug River Railroad Company, and Norfolk and Western Railway Company.*

Mr. Theodore W. Reath,
General Counsel, Norfolk & Western Ry. Co.,
1201 Commercial Trust Building,
Philadelphia, Pennsylvania.

My dear Mr. Reath:

I am handing you herewith four printed copies of a petition in equity, with the accompanying exhibits, filed by The Chesapeake and Ohio Railway Company on Saturday last, December 8th, in the Clerk's Office of the United States District Court for the Southern District of West Virginia. We also, in accordance with the provisions of the Urgent Deficiencies Act, presented the petition to the Judge, and the letter to him of which I am enclosing a copy was written in accordance with his request that other copies of the petition be sent to him, so that he might be able to send them to such other judges as he might associate with him in pursuance of the terms of the Act.

I am also sending you copies of a letter and notice, which are self-explanatory, which I am sending to Mr. W. W. Boxley and W. W. Boxley & Company.

The petition and exhibits are self-explanatory, but I am particularly requested by Mr. Harahan to say on behalf of our management, and I wish to say on my own behalf, that we regret the necessity of taking this proceeding, but in the view which we take of the law and

the very important interest of this Company in the situation, no other course is possible.

I should like to add that if there is any way consistent with the prompt presentation and disposition of the matter—the question of the time of hearing is of course not within our control—in which we can reasonably serve your convenience in connection with the presentation of the matter I shall be only too happy to co-operate to that end. When we presented the petition to the Judge he said that he did not think it would be possible, in view of pre-existing engagements on his part and on the part of such judges as he might associate with him, for the case to be heard before the end of the year, and that ordinarily the most available opportunity for constituting a statutory court was presented by the meeting of the Circuit Court of Appeals for this Circuit, which is to convene, as I understand, on or about January 10th next. Judge McClintic apprehended that it might be possible for this case to be heard shortly before or during that term of the Circuit Court of Appeals, and he indicated that Richmond might be the most convenient place for the hearing. While of course not presuming to speak for you, I said the obvious thing that I imagined that Richmond would be a more convenient place for the hearing for all the parties to the cause.

I understood that the Judge would advise me further after he had taken the matter up, and I shall promptly advise you further upon hearing from him. If there is anything that I can do in the meantime to facilitate your consideration of it, as by sending additional copies of the petition, I will be glad to do so.

Very truly yours,

ROBT. B. TUNSTALL,
Assistant General Counsel.

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CHARLES ELMORE CRO
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IN THE

Supreme Court of the United States

No. 73 OF OCTOBER TERM, 1930

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, APPELLANT,

v.

UNITED STATES OF AMERICA, GUYANDOT AND TUG RIVER RAILROAD COMPANY, NORFOLK & WESTERN RAILWAY COMPANY, AND INTERSTATE COMMERCE COMMISSION, APPELLEES.

Reply of Appellant to Briefs Filed on Behalf of the Governmental Appellees and the Corporate Appellees, Respectively.

HERBERT FITZPATRICK,
ROBT. B. TUNSTALL,
THOMAS L. PRESTON,
Counsel for Appellant.

Richmond, Va.,
January 14, 1931.

LEWIS PRINTING CO., INC., RICHMOND, VA.

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IN THE

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THE CHESAPEAKE AND OHIO RAILWAY COMPANY, APPELLANT,

v.

UNITED STATES OF AMERICA, GUYANDOT AND TUG RIVER RAILROAD COMPANY, NORFOLK & WESTERN RAILWAY COMPANY, AND INTERSTATE COMMERCE COMMISSION, APPELLEES.

Reply of Appellant to Briefs Filed on Behalf of the Governmental Appellees and the Corporate Appellees, Respectively.

Two briefs have been filed herein on behalf of appellees: one jointly by the United States and the Interstate Commerce Commission (hereinafter together referred to as the "United States"), and the other jointly by the Norfolk and Western Railway Company and its subsidiary, the Guyandot and Tug River Railroad Com-

pany (hereinafter together referred to as the "Norfolk"). Because both briefs raise a defense based upon a question of law not presented by appellees to the court below, a reply would be necessary in any event; and it is additionally important in view of a number of questions of fact and of law presented by both briefs. Moreover, two decisions rendered by this Court since our Opening Brief was prepared have, as we shall see, a very distinct bearing upon the issues in this case.

We shall first notice the points, principally of law, common to both briefs, and then call attention to other matters, principally of fact, which require special mention. The discussion will take the following order:

(1) The contention, now for the first time advanced by appellees, that the appellant is without the interest requisite to the institution and maintenance of this suit.

(2) The assertion that the Commission's order comprised an administrative plan, not severable as between the authorities granted respectively to the Norfolk and the Virginian.

(3) The question whether substantial evidence supports the order, there being shown in this connection the immediate bearing of the two cases just decided by this Court, and referred to above.

(4) A more detailed treatment of statements of fact and of position in the opposing briefs to which exception is taken.

(5) Conclusion.

I.

APPELLANT HAS THE LEGAL INTEREST REQUISITE TO THE INSTITUTION AND MAINTENANCE OF THIS SUIT.

The appellees contend that under the decision of this Court in the case of *Alexander Sprunt & Son, Inc. et al., v. United States* (1930), 281 U. S. 249, and the decision of a three-judge district court in *Pennsylvania Railroad Co. v. United States, et al.* (W. D. Penna., 1930), 40 F. (2d) 921, appellant is without the legal interest requisite to entitle it to institute and maintain this suit (U. S. Brief, pp. 22-30; Norfolk's Brief, pp. 43-51). We are convinced that the court in *Pennsylvania Railroad Co. v. United States, supra,* and counsel for the appellees here, entirely misconceive the meaning and effect of the decision of this Court in the *Sprunt Case, supra.* The contention of appellees, if sound, is far-reaching; and we accordingly especially invite the attention of the Court to the issue thus presented.

The *Sprunt Case,* in the district court, was a consolidation of two suits separately brought to set aside an order of the Commission requiring certain carriers to remove undue prejudice and preference found to result from rates on cotton shipped from interior points to ports on the Gulf of Mexico, the first suit having been instituted by Alexander Sprunt & Son, Inc., and others, shippers interested in water-front compresses and warehouses, and the second by certain carriers affected by the order of the Commission. The district court upheld the Commission's order and entered a decree dismissing the bills.

None of the carriers appealed from the decree. Ac-

quiescing in the decision of the District Court and in the order of the Commission, they established the prescribed rate adjustment. The resulting situation, so far as the carriers were concerned, was declared by this Court to be "as if the new rates had been filed wholly of their own accord and as if there had never been a controversy before the Commission" (p. 256).

The shippers, however, appealed directly to this Court, where they were held to have no standing, in their own right, to attack the order of the Commission. The Court recognized that the order deprived the shippers of an advantage theretofore enjoyed over other competitors of 3.5 cents per hundred pounds, and that their economic position was thus worsened. But the full extent of the legal right of the shippers was, in the language of the Court, to "reasonable service at reasonable rates and without unjust discrimination. If such service and rates are accorded them, they cannot complain of the rate or practice enjoyed by their competitors or of the retraction of a competitive advantage to which they are not otherwise entitled" (p. 255). And this Court said further:

> "Why the carriers filed the new rate structure now in force is no concern of the appellants. If the carriers had done so wholly of their own motion, obviously these shippers would have had no ground of complaint, before any tribunal, unless the new rates were unreasonable or unjust. If they were believed by the appellants to be so, a complaint before the Commission would be the appropriate remedy" (p. 255).

It results that the full extent of the decision—which merely reaffirms the principle of *Hines, et al.*, v. *United*

States (1923), 263 U. S. 143, cited by appellees (U. S. Brief, p. 23)—is that a shipper benefiting by a given advantageous rate adjustment has no legal standing in court to insist upon the *status quo*, when the carrier, having the right so to do, modifies the rate adjustment in a manner rendering it less advantageous to the shipper. If the new adjustment is unreasonable or unjust, the shipper's recourse is in the first instance to the Commission, not to the courts. In this case there is no corresponding question to lay before the Commission.

The district court in the *Pennsylvania Railroad Case*, above referred to, apparently construes the *Sprunt* decision as denying to an interested carrier any legal standing to sue to set aside an affirmative order of the Commission authorizing new construction under paragraph 18 of Section 1 of the Interstate Commerce Act. We say the court "apparently" so decided—for the opinion is confused and the reasoning circular.

The order of the Commission involved in that case granted a certificate authorizing the Pittsburgh & West Virginia Railway Company to extend its line into Donora, a point theretofore exclusively served by the Pennsylvania. The latter carrier, conceiving the order to be void for want of any evidence of public convenience and necessity, sued to restrain the new construction. In its opinion dismissing the bill, the court, after dwelling upon the breadth of discretion committed to the Commission as a body of experts, came to the question, "Are there any facts?" and found that "there was * * * competent evidence on which the Commission could, and did, exercise its discretion with reference to the public convenience and necessity involved in the extension in dispute" (p. 924). Not until it had thus upheld the Commission's order upon the merits, did the court dis-

cuss the legal right of the Pennsylvania to sue. This curious approach is explained by the following statement:

> "Discussion of what is really the first question in the case, that of the right of the Pennsylvania Railroad Company to maintain its bill in view of its lack of legal right to the entire transportation business of Donora and for want of legal wrong, committed or threatened, or of legal injury inflicted, by the Commission's order, *has been purposely postponed until after the issues and facts of the case have been stated so that the question of law might stand out more sharply*" (p. 925; italics supplied).

But as we have seen, the court had not contented itself with *stating* "the issues and facts". What it had done was to state the facts and decide the merits. Then, coming to what it called "really the first question in the case", the opinion in large part paraphrases the language of this Court in the *Sprunt Case*, which it cites as the only authority for its conclusion, and goes on as follows:

> "True, the complainant now is and for a long time has been exclusively serving Donora and is now receiving the profits from handling all the traffic flowing into and out of that busy district. But that is a privilege rather than a right—a privilege to be enjoyed so long as it shall last, not a right to be asserted, unless it be found somewhere in the law, written or unwritten. Certainly there is no unwritten law that gives a carrier, first to serve a community, the right to hold its traffic against all competitors. It is equally certain that the written law—the Transportation Act of 1920—does not explicitly or implicitly accord a noncompetitive traffic area to the first taker as the law accords a trade-

mark to the first adopter. Instead of doing this the written law negatives such a right by providing expressly for the invasion by one carrier into a territory exclusively served by another on a showing of convenience and necessity of more transportation service for those inside reaching out and those outside reaching in. *Where, as here, the showing is lawfully made and the Commission has validly acted,* the carrier at whose expense the change is wrought has had no legal right invaded and has suffered no legal injury. In consequence it has nothing on which to sustain an independent suit to vacate and set aside *such an order* of the Interstate Commerce Commission" (p. 925; italics supplied).

Thus, not a statement of facts but a prior decision on the merits that the order complained of was valid was made to serve the end "that the question of law might stand out more sharply"!

We are sensible of doubt whether the court intended by the language last quoted to decide that the Pennsylvania could not rightfully bring the suit, or for the second time to decide that it could not prevail. If, as our opponents say, the decision denies the legal right of a carrier adversely affected to question in court the validity of a certificate of the Commission authorizing new construction, we submit (1) that it finds no support in the *Sprunt Case,* and (2) that it is plainly erroneous.

The *Sprunt Case* did not question the right *of the carriers* to sue for an injunction setting aside the order there in question. *It merely denied the right of a shipper to assert independently an interest purely incidental to and dependent upon a carrier right which was not by the carriers asserted.* In the *Pennsylvania Railroad Case,* had the Pennsylvania acquiesced in the order, the *Sprunt*

Case would have precluded a suit by an individual deprived of an economic advantage as a result of the order —as for instance a lessor to the Pennsylvania of terminal facilities at Donora under a perpetual lease calling for rental on a user basis. But that is all.

The fundamental error at the root both of the *Pennsylvania Railroad Case*, and the contention of our opponents as well, lies in the supposition that the legal right asserted in such a suit as that at bar involves any claim of absolute right to a noncompetitive status. It is perfectly true that the Transportation Act contemplates the extension of a railroad into territory already served by another--but only where validly authorized by the Commission as required in the interest of public convenience and necessity. The only right asserted is to protection from new competitive construction not validly authorized, but only colorably so through an order beyond the power of the Commission. As to competition, our contention is that the bare fact that new construction will create, preserve or promote the same gives no support to a certificate. But competition accompanied by "a showing of convenience and necessity of more transportation service for those inside reaching out and those outside reaching in", may of course support the granting of a certificate.

The private carrier right to protection from new competitive construction not required in the public interest arises by plain implication from the Transportation Act; for the Commission, in passing upon applications under Section 1 (18)-(20) acts in a quasi-judicial capacity, and if a carrier adversely affected by an affirmative order granting a certificate may not sue, then no judicial review is possible. In the *Chicago Junction Case* (1924), 264 U. S. 258, 264-6, it was held that in Section 5 (2) of the Act, "Congress by using the phrase 'whenever the

Commission is of opinion, after hearing,' prescribed quasi-judicial action" reviewable at the instance of a carrier adversely affected. Section 1 (19) provides that the application for and issuance of any certificate of public convenience and necessity shall be under such rules and regulations as to hearings as the Commission may from time to time prescribe, and provides that notice with the right to be heard shall be given the governors of all interested States and published in the press. In *Ex Parte* 94, *Procedure Under Barge Line Act* (1928), 148 I. C. C. 129, 135, the Commission held subsequent hearings sufficient under the Barge Line Act, saying that a certificate under that Act might issue "without the notice and hearing provided for in section 1 (19) of the Interstate Commerce Act." In the *Chicago Junction Case; supra*, it was said by this Court, 264 U. S. at p. 265, foot-note 10:

> "Transportation Act, 1920, like the original Act to Regulate Commerce and earlier amendments, distinguished, by the language used and, also, in other respects, between those orders which can be made only after hearing and those as to which no hearing is required. Thus, orders on applications for extension of line, for new construction, or for abandonment under Sec. 1, pars. 18-20, can be made only after hearing."

In *Colorado* v. *United States* (1926), 271 U. S. 153, 166, it was distinctly held that an order of the Commission under Section 1 (18) of the Interstate Commerce Act granting a certificate for abandonment was subject to judicial review. And in *Piedmont & N. Ry. Co.* v. *United States* (1930), 280 U. S. 469, 478, where this Court refused to set aside an order of the Commission denying a certificate of public convenience and necessity, it was said:

> "The case is entirely different from those cases where an application for a certificate is alleged to have been erroneously granted, as in *The Chicago Junction Case*, 264 U. S. 258, and *Colorado v: United States*, 271 U. S. 153. There, a judicial review is provided in order to protect a legal right of the plaintiff alleged to have been infringed by an order which authorizes affirmative action." (p. 478).

Quasi-judicial action necessarily implies judicial review. Yet if the contention that appellant cannot sue be sustained, there can be no review in convenience and necessity cases involving applications for new construction. If the certificate is refused, applicant has no redress, for the order is negative. If it is granted, any claim of independent right to sue by shippers is precluded by the doctrine of the *Sprunt Case*. Only carriers adversely affected have a shadow of claim to sue for nullification of a void affirmative order. Therefore, we submit, a legal standing to institute and maintain this suit is accorded appellant by necessary implication; for otherwise reviewable action by the Commission must needs go unreviewed.

It would, indeed, be a remarkable thing were the Transportation Act so construed as to withhold judicial review of the Commission's action with respect to new construction, for the provisions requiring certificates of public convenience and necessity are among the major central departures from the past whereby a new and affirmative policy of regulation was brought into operation. It is not conceivable that Congress intended to vest in the Commission uncontrolled discretion as to this vital matter, at the same time affording judicial review as to rate-making, divisions, joint use of terminals, and other matters.

Moreover, to construe the Act otherwise than as conferring the right to sue upon a carrier situated as is appellant, would bring directly into point the following language of this Court in *Interstate Commerce Commission* v. *L. & N. R. R. Co.* (1913), 227 U. S. 88, 91:

> "And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

In our Opening Brief, we relied upon three cases as sustaining the jurisdiction of the Court: *Piedmont & N. Ry. Co.* v. *United States, supra; Chicago Junction Case, supra;* and *Texas & Pac. Ry.* v. *Gulf, etc., Ry.* (1926), 270 U. S. 266 (Opening Brief, pp. 65-8).

As to the last-named case, both the United States and the Norfolk point out that the construction there involved was underaken by the carrier without securing a certificate from the Commission, and that in such cases a right to sue is expressly conferred by Section 1(20) of the Act upon "any party in interest". (U. S. Brief, p. 28; Norfolk's Brief, p. 45). We are disposed to agree that this express grant of a right to sue renders inappropriate our citation of the case to the jurisdictional point here involved. We would observe, however, that upon the merits of the controversy, the case remains indistinguishable (Opening Brief, pp. 58-60).

Of the *Chicago Junction Case,* both opposing briefs observe that the order of the Commission there under attack was entered under Section 5(2) and the Government notices that the attack of the carriers upon the order "was upheld because the order caused them injury by depriving them of the equality of treatment to which carriers are 'as fully entitled as any shipper' " (U. S. Brief, p. 30, footnote 10; Norfolk's Brief, pp. 44-5). The fact remains, however, that the right of the carriers to sue was challenged in that case and upheld, although, as this Court pointed out, before Transportation Act, 1920, the Interstate Commerce Act would neither have prohibited the owners from selling nor the New York Central from purchasing the terminal facilities involved in the controversy. Nor was the right to sue expressly conferred by the Act. Yet because the Act, *inter alia,* prohibited any acquisition of a railroad by a carrier unless authorized by the Commission, "the plaintiffs, being competitors of the New York Central, and users of the terminal railroads theretofore neutral, have a special interest in the proposal to transfer control to that company". We submit that this case, upholding the right of carriers adversely affected to sue to set aside an order of the Commission, even though there has been no invasion of any common law right and without the authority of express statutory provision, is direct authority for the legal right of appellant here to sue. For here, as there, the right of the plaintiff arises by implication from a statutory prohibition, actual or constructive, removable only by valid authorization of the Commission. This Court, in the *Sprunt Case, supra,* at p. 257, distinguished the *Chicago Junction Case,* observing (footnote 5):

> "In the *Chicago Junction Case*, the order violated the plaintiff's right under paragraph 2 of section 5 (49 U. S. C. A. Sec. 5 (2)) to equal treatment; and the plaintiff, with those similarly situated, was the only person in interest against the order."

We have shown that appellant here is "the only person in interest against the order", and that if it may not sue then the courts are powerless to review any action of the Commission under Section 1(18)-(20), because there is no one to set their machinery in motion.

The United States refrains from criticism of appellant's treatment of *Piedmont & N. Ry.* v. *United States, supra,* but the Norfolk comments that the order there attacked denied an application for a certificate under Section 1(18) and that the court refused the relief prayed because if the order was beyond the Commission's jurisdiction "then obviously the order is no obstacle to the railway's plan" (Norfolk's Brief, p. 44). We stated in our Opening Brief, pp. 66-7, that the order involved in that case was negative, and that this was the very fact which occasioned the Court to distinguish the *Chicago Junction Case* and *Colorado* v. *United States* upon the ground, equally predicable of the instant suit, that "there, a judicial review is provided in order to protect a legal right of the plaintiff alleged to have been infringed by an order which authorizes affirmative action".

The United States seeks to establish an analogy between this suit and hypothetical suits brought by one carrier to set aside orders of the Commission granting to a rival carrier (1) authority to issue new securities and (2) authority to include a given third carrier in its system through consolidation (U. S. Brief, pp. 29-30). We deny any analogy. In this suit, appellant seeks protection from injury threatened through diversion of traffic

which would otherwise move over its own superior and wholly adequate line to an inferior, uneconomical and unnecessary line the proposed construction of which is not required in the public interest. Such an interest cannot be likened to a desire to prevent the issue of securities by a rival carrier, for the economic effect, if any, of such issue upon the plaintiff is remote and consequential only. Nor can any analogy be sustained between appellant's interest here and that which would be asserted in a suit to enjoin an order authorizing consolidation. Should the injunction prayed for herein be granted, appellant will have the legal right to transport all the traffic delivered by the Virginian at Gilbert. But even should a consolidation order be enjoined, no legal right of consolidation would exist in the rival plaintiff. Authorization by an affirmative order of the Commission would still be required.

Upon this branch of the case, we confidently submit that the affirmative order of the Commission under attack is subject to judicial review (*Piedmont & N. Ry. Co.* v. *United States* (1930), 280 U. S. 469; *Colorado* v. *United States* (1926), 271 U. S. 153; *Chicago Junction Case* (1924), 264 U. S. 258) at the instance of appellant as the only party in interest against the order (*Sprunt & Son, Inc.*, v. *United States* (1930), 281 U. S. 249; *Chicago Junction Case, supra*), and that the argument of our opponents to the contrary is based upon a misconception of the holding of this Court in the *Sprunt Case, supra*, and can lead only to the impossible result that the judicially reviewable action of the Commission in granting certificates of public convenience and necessity under Section 1 (18) of the Act cannot be reviewed for want of any proper party to set in motion the processes of the court.

II.

THE ACTION OF THE COMMISSION IN AUTHORIZING THE GILBERT-WHARNCLIFFE LINE IS SEVERABLE FROM ITS ACTION WITH RESPECT TO THE ITMANN-GILBERT LINE AND THE COURT WILL NOT BY GRANTING THE INJUNCTION PRAYED FOR HEREIN SUBSTITUTE ITS JUDGMENT FOR THAT OF THE COMMISSION UPON AN ADMINISTRATIVE QUESTION.

Counsel for the United States insist that the Commission authorized construction by the Virginian of the Itmann-Gilbert line and construction by the Norfolk of the Gilbert-Wharncliffe line as interrelated parts of a single administrative plan (U. S. Brief, pp. 14-22), and in this position they are now joined by the Norfolk (Norfolk Brief, pp. 51-4), although no such position was taken by it in the court below. This insistence is sought to be fortified by recital of considerations which are stated by counsel—but not shown by the Commission's report—to have induced the action of the Commission with respect to construction of the one as well as the other line (U. S. Brief, pp. 17-21). The gist of the position is contained in the following sentence (U. S. Brief, pp. 21-2):

> "Certainly it cannot be said that, if the Commission had known that the one part of its order would be enjoined, it still would have prescribed the exact plan of lines contained in the balance of its order."

In the first place, we call attention to the absence of any indication in the order of the Commission that

the authorities granted the Virginian and the Norfolk, respectively, were in any way conditional or interdependent. This is important in view of the uniform practice of the Commission, in cases where any condition attaches to the authority granted by its certificate, of setting forth such condition in express terms in its order. See, for example, orders entered in *Construction of Lines in Eastern Oregon* (1926), 111 I. C. C. 3, 58-60; *Construction of Line by Chicago, Rock Island & Pacific Ry.* (1926), 111 I. C. C. 347, 353-4; *Construction and Abandonment of Lines by Chicago & North Western Ry. Co.* (1926), 111 I. C. C. 313, 316-17; *Abandonment of Line by Choctaw, Oklahoma & Gulf R. R.* (1926), 111 I. C. C. 81, 83-4; *Construction of Line by Waco, Beaumont, Trinity & Sabine Ry.* (1927), 124 I. C. C. 769, 807-9; *Control of Central California Traction Company* (1927), 131 I. C. C. 125, 139-40; *Proposed Construction of Branch Line by Pere Marquette Railway* (1928), 138 I. C. C. 699, 714; *Construction and Acquisition of Lines by Algiers, Winslow and Western Railway Company* (1928), 145 I. C. C. 123, 129-30; *Construction and Abandonment by Southern Pacific Company* (1928), 145 I. C. C. 515, 517-18; *Quanah, Acme & Pacific Railway Company Construction* (1930), 158 I. C. C. 699, 703-4; *Gulf & West Texas Ry. Co. Construction* (1930), 158 I. C. C. 563, 575-6; and *Extension of Miami Municipal Railroad* (1929), 158 I. C. C. 169, 179-81.

But, without repeating all that was said in our Opening Brief, we submit as a conclusive reply the fact that the Commission by affirmative action gave its administrative sanction to construction of the Virginian's Itmann-Gilbert line even in the event that the Norfolk's Gilbert-Wharncliffe line should not be built. In appellant's Opening Brief, p. 8, it is shown that upon petition of

appellant for rehearing as to authorization of the Gilbert-Wharncliffe line *only*, the Commission, on October 20, 1928, permitted its authorization of the Virginian's Itmann-Gilbert line to *take effect*, at the same time *suspending* its authorization of the Norfolk's Gilbert-Wharncliffe line; and on page 45 of that brief it is pointed out that by this action the Commission *necessarily declared that whatever might be done as to the Gilbert-Wharncliffe line*, the Virginian's Itmann-Gilbert line should be permitted. It inevitably results that this Court cannot regard the line of the Norfolk and that of the Virginian as interdependent parts of a unified administrative plan.

This conclusive point was clearly and explicitly made in our Opening Brief. As to it, both opposing briefs preserve a significant silence.

Appellees argue that the Court cannot substitute its judgment for that of the Commission upon administrative questions. We agree. But were this Court to hold that the order of the Commission is not severable as to the Gilbert-Wharncliffe line because construction of that line and of the new line of the Virginian constitute a unified and indivisable administrative plan, it would substitute its own judgment to that effect for the expressed judgment of the Commission squarely to the contrary.

III.

THE COMMISSION'S AUTHORIZATION OF THE GILBERT-WHARNCLIFFE LINE IS VOID FOR WANT OF ANY SUBSTANTIAL EVIDENCE OF PUBLIC CONVENIENCE AND NECESSITY FOR CONSTRUCTION AND OPERATION OF THE LINE AND BECAUSE BASED UPON A MISCONCEPTION OF THE APPLICABLE LAW.

Was the finding by the Commission of public convenience and necessity for the Gilbert-Wharncliffe line supported by substantial evidence?

The decisions of this Court in *The Beaumont, Sour Lake & Western Railway Company* v. *United States,* decided November 24, 1930, 282 U. S. ....., and in *Florida, et al.* v. *United States,* decided January 5, 1931, 282 U. S. ....., bear most strikingly upon the approach to and argument of this question by both the United States and the Norfolk, as well as upon the disposition made of the case by the court below. The opinion in *The Beaumont, Sour Lake & Western Case* calls upon the Commission to state with clarity and completeness in its report the reasons for its determinations, and declares:

> "The general statements in the reports to the effect that the Commission in reaching its conclusions considered all the pertinent evidence add nothing to the *prima facie* presumption that generally attends determinations of the Commission."

The opinion in *Florida* v. *United States* declares that the Court will not play the role of a fact-finding body and search the record for appropriate findings which per-

adventure might have been, but in fact were not, made by the Commission. Mr. Chief Justice Hughes said:

> "The Commission made no findings as to the revenue which had been derived by the carrier from the traffic in question, or which could reasonably be expected under the increased rates, or that the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an adequate transportation service.
>
> "The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this Court has recently adverted (*The Beaumont, Sour Lake & Western Railway Company* v. *United States*, decided November 24, 1930, 282 U. S. .....), but of the lack of the basic or essential findings required to support the Commission's order. *In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported*" (italics supplied).

In the light of these decisions, we would recall the Court's attention to the phenomenon adverted to in our Opening Brief, p. 10, that in this case the appellant, although the party attacking the validity of the Commission's certificate, accepts as supported by the record every fact recited in the exhaustive report of the Commission as well as the only findings of that body as to

the Gilbert-Wharncliffe line, while those who uphold the validity of the order seek additional evidential support extraneous to the meager findings of the Commission. In the lower court, however, this fact-hunting was confined to considerations asserted to be deducible from the evidence, though not mentioned by the Commission in its report—such, for example, as the assertion that the Gilbert-Wharncliffe line is needed as a "cross-line" between the rails in the Tug River and Guyandot Valleys, respectively (Norfolk's Brief, pp. 42-3).

But in this Court the departure from the Commission's findings has been extended (1) to facts recited by counsel but not shown by the record, (2) to briefs, never introduced in this record, filed in the proceedings before the Commission by a carrier not party to this suit, and (3) to a brief filed by appellant in proceedings wholly distinct from the case at bar. Witness (1) the recitation of facts by counsel for the Norfolk in their paper filed herein entitled "Railway Construction Since Case Was Heard in the District Court"; (2) the extensive quotation by the Norfolk of assertions of fact by counsel for the Virginian in their Reply Brief before the Commission (Norfolk's Brief, pp. 26-7); and (3) the Norfolk's quotation from appellant's brief in Finance Docket 7562, where appellant was opposing a certificate for construction by the Virginian of a bridge at Deepwater (Norfolk's Brief, p. 15). The case is reported as *Virginian Railway Company Extension* (1930), 162 I. C. C. 552.

We question the right of the Norfolk to quote from briefs in other proceedings, and we submit that the impropriety of doing so is illustrated by the misleading effect of the quotation from appellant's brief in Finance Docket 7562. In that brief, we compared the route via the Virginian's proposed bridge at Deepwater with other

available routes, and we characterized appellant's route via Gilbert as extraordinarily efficient, commenting that if the Gilbert-Wharncliffe line is built another route almost as efficient will be available. Without stopping upon the point that we said nothing as to economy in operation of the Gilbert-Wharncliffe line, we point out that the Deepwater route, in appellant's view, at least, is incomparably worse than either the route via Wharncliffe or that via the Logan Subdivision and that, for the purposes of that comparison, the difference in favor of the Logan Subdivision was neither of great magnitude nor importance. Both routes were regarded as far superior to the route under attack, and that was the point we sought there to make. It is nevertheless true that the Logan Subdivision can accommodate all the business the Virginian can deliver at Gilbert, that its line has superior grades and can be far more economically operated than the costly Gilbert-Wharncliffe line, and that the showing of these facts upon this record does "appear conclusively to demonstrate the useless wastefulness of the proposed construction". That appellant should be compelled in argument here to discuss the Deepwater bridge case in order to remove an imputation that expediency overrides fact in the preparation of its briefs, we deem illustrative of the vice of departure from the record for statements which cannot be correctly understood when divorced from the context in which they are made. There can be no orderly discussion where the limits of relevancy are disregarded.

The argument upon the facts presented by both the United States and the Norfolk repeatedly invites this Court to assume the role of a fact-finding body, to go beyond the question whether the record gives support to findings made by the Commission, and to examine into

the matter whether the Commission might have reached other findings than those it actually made. Thus, the United States, in the following statements, dwells upon evidence none of which bears upon the only conclusion stated by the Commission to support the Gilbert-Wharncliffe line,—to-wit, that by its construction and operation the Norfolk will be enabled to compete with appellant for westbound traffic from the Guyandot Valley and shippers in that territory afforded competitive service:

> "While the tributary coal reserves of the N. & W. are much larger than those of the Virginian, they are only 60 per cent as large as those of the C. & O. (R. 55.) The N. & W. now receives a large amount of revenue from its participation in the westbound movement of coal from the Upper Guyandot Basin (R. 38, 39, 92), of which it would in large part have been deprived, if the court had prevented it from building the Gilbert-Wharncliffe extension while at the same time leaving the Virginian free to build the line from the Upper Guyandot Basin to a connection at Gilbert with the C. & O. only. The Commission, by authorizing the Virginian to build the line down Guyandot River to Gilbert, recognized that carrier's needs for additional coal reserves and for a more suitable outlet for westbound coal originating on its present lines." (U. S. Brief, p. 20);
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> * * * *
>
> "Evidence submitted by the N. & W. (R. 213-214) and considered by the Commission (R. 42) showed that a proposed line from Elmore down the Guyandot River to Gilbert with extension beyond to Wharncliffe would reduce operating costs by about 14 cents per ton as compared with the costs over the route via Matoaka. R. 213 to 214.)" (U. S. Brief, p. 32);
>
> * * * *

> " * * * the evidence showed that there were large deposits of coal on Gilbert and Horsepen Creeks, estimated at from 120,000,000 tons to 170,000,000 tons. * * * There was testimony in the record that the deposits could best be developed by the Gilbert-Wharncliffe line or by a short branch extending from that line up Horsepen Creek. (R. 91, 226, 229.)" (U. S. Brief, p. 33).

The Norfolk joins the United States in emphasizing these evidential considerations (Norfolk's Brief, pp. 23-38), and adds particular reference to holdings in the Guyandot Valley of the Pocahontas Coal and Coke Company, its subsidiary, acquired for the purpose of suppressing competition of other carriers (Norfolk's Brief, p. 35; R. 207-8).

The Commission, however, did not find that the proposed line was needed to increase the coal reserves of the Norfolk, nor was any revenue need of that carrier ever adverted to as contributing to the necessity for this new construction. And as to our opponents' reference to Virginian coal reserves, it is impossible to see how they can be in any way affected by construction by the Norfolk of the line from Gilbert to Wharncliffe. The saving of 14 cents over the Matoaka route was not regarded by the Commission as justifying the line, for it did not predicate its conclusions upon that circumstance, a fact readily understandable in view of the still greater economy of appellant's wholly adequate line. Coal deposits on Gilbert and Horsepen Creeks were not found by the Commssion to support authorization of the line; and despite the assertion of the United States (p. 33) to the contrary, there was no testimony that these deposits could be reached better from the Norfolk's proposed line than from appellant's existing line and/or the Virginian's au-

thorized line. The United States cites the record at pages 91, 226 and 229, but examination will show that these references respectively establish merely (1) that the court below erroneously found as our opponents contend, (2) that the coal deposits can be reached from the proposed line, and (3) that the coal deposits do exist, without a scintilla of evidence to refute the testimony of the map itself that they can quite as readily be reached from other existing or authorized facilities (Opening Brief, pp. 20, 32-3). The assertion that the line is needed as a "cross-line" is simply without any evidential support whatever.* As to the Pocahontas holdings, the Norfolk's line will add nothing to their accessibility, which will be almost completely achieved by the Virginian's new construction. The willingness of the Norfolk to permit their exploitation bears legitimately upon the public interest only so far as that exploitation might bring revenue support to the Virginian's line, which would serve them as the initial carrier; and since the record shows that they are already largely under development under existing transportation conditions, the natural deduction follows that they will be developed when market conditions permit. Assuredly the completion of the Norfolk's original monopolistic design carries no suggestion of the promotion of the public interest.

It is not, indeed, asserted that these matters were distinctly found by the Commission to indicate public need for the proposed line, but it is said by the United States:

> "All the above evidence was considered at length in the Commission's report and entered into its ulti-

*The passage cited in support (Norfolk's Brief, p. 43) is R. 216, but all that is stated there is that the line "would afford railroad facilities" to jobbers at Williamson if they desired it and if the business offered required it. There is no showing of a need for the line. See Original Brief, pp. 25-6.

> mate determination and finding that the public convenience and necessity required or will require the construction of the Gilbert-Wharncliffe line." (U. S. Brief, p. 34).

We vouch the record for the assertion that the statement just quoted is without any foundation save the stereotyped words of the report (R. 57): "Upon the facts presented we find," etc. And as to that we have the authority of *The Beaumont, Sour Lake & Western Case, supra,* for the assertion that those words add nothing of substance to the effect of the report.

Competition, and only competition, was held by the Commission to warrant construction of the line between Gilbert and Wharncliffe. The United States and the Norfolk would have this Court find that the line is required in the public interest by reason of the other considerations just alluded to. We are here less concerned to dwell upon the inaptness of these considerations as tending to show public convenience and necessity, as to which we rely in the main upon our Opening Brief, than to urge that the court below, in basing its holdings upon matters not found by the Commission to be pertinent, substituted itself for the fact-finding body and exercised an administrative rather than a judicial discretion, and that our opponents now invite like action by this Court. But the invitation is certainly to be declined in view of what was held in *Florida* v. *United States, supra:* "The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported."

We are thus led from the wilderness of judicial and forensic fact-seeking, to the clean cut question, Does

the record support the following findings as to the Gilbert-Wharncliffe line? (R. 57):

> "The construction of that part of the N. & W.'s proposed line from Wharncliffe to Gilbert would enable the N. & W. to compete with the C. & O. for westbound traffic from the Guyandot Valley, and would assure operators in the territory competitive service to the west."

The answer is not far to seek, for appellant admits that the proposed line would enable the Norfolk to compete with appellant and thereby afford competitive service to shippers. *It results, therefore, as appellant has conceived from the outset, that the issue in this suit turns squarely upon the naked question whether, under the Transportation Act of* 1920, *new construction can be validly authorized solely in order to beget or preserve competition for competition's sake alone.* And we confidently submit that it cannot be so held, for the policy of the law in requiring certificates of public convenience and necessity would thereby be set at naught. We need not here repeat our opening argument on this point (Opening Brief, pp. 30-32, 51-65).

It is needful, however, to notice briefly (1) the appellees' attempted distinction of the decision of this Court in *Texas & Pac. Ry.* v. *Gulf, etc., Ry.* (1926), 270 U. S. 266, and the holding of the Commission in the *Utah Terminal Case* (1922), 72 I. C. C. 89, relied upon in our Opening Brief, pp. 58-65, and (2) the argument of the appellees that competition may justify new construction.

(1) It is argued that the *Texas & Pacific Case* and the *Utah Terminal Case* are inapplicable here because those cases dealt with "invasion through new construction of

territory adequately served by another carrier," whereas, in this case, according to appellees, the territory involved is not now served by any carrier (Norfolk's Brief, pp. 21-3). The same point is otherwise indicated by the caution that " it should be kept in mind that the traffic which will come to it (the Norfolk) over the Itmann-Gilbert line is not traffic now enjoyed by the C. & O. but is new traffic that will be developed on a new line authorized by the same order that authorized the Gilbert-Wharncliffe line, and traffic from the Upper Guyandot Basin that will be diverted by the new line from present routes—in large part from the route via Matoaka and the lines of the N. & W." (U. S. Brief, p. 37). This argument is a mixture of law and of fact. In the next division of this brief we shall deal with it from the standpoint of fact. Its legal aspect is reducible to the absurdity that the law, while concerned to prevent unnecessary construction which will take away business already acquired by another carrier, is complacent as to wasteful construction in a competitive race for new business. But the Commission itself, in dealing with the Gilbert-Wharncliffe line, regarded the situation as though the Virginian's line were completed to a connection with appellant's line at Gilbert, and, considering the traffic as moving via the route thus afforded, it authorized the Gilbert-Wharncliffe line solely to the end that competition for that business by the Norfolk might be created.

(2) It is appellant's conception that the purpose of the law in requiring certificates of public convenience and necessity for new construction was to prevent the creation of railroad facilities for *purely* competitive purposes —and such purposes are the only ones the accomplishment of which was deemed by the Commission to justify the Gilbert-Wharncliffe line. But the appellees insist that

competition may justify new construction. And here they advance a *non sequitur*, saying:

> "Since the invasion by one carrier of the territory of another necessarily establishes competition, the power given the Commission to authorize such invasion negatives the idea that the benefits that may be obtained by establishing competition are not among the elements to be considered by the Commission." (U. S. Brief, p. 38.)

Plainly this confuses a result with a justification. From the fact that new construction may result in competition it does not follow that new construction may be authorized solely to that end. Nor does it follow, as contended by the appellees (U. S. Brief, p. 38), from the express authority conferred upon the Commission by Section 15(6) to adjust divisions with an eye to the revenue needs of particular carriers, that facilities which can fill no useful transportation purpose may be constructed for revenue purposes only. The express provision of Section 15(6) goes to emphasize the absence of like authority under Section 1(18)-(20). But in any event it is clear that the record discloses as to the Norfolk no condition of straightened financial circumstances and that the Commission did not authorize the line with any such consideration in mind.

It is said that competition may justify a new line because it will furnish diversified car supply, a stimulus to improved service or insurance against complete failure of service. (U. S. Brief, pp. 40-41). Doubtless a new competing line may be justified by a showing, utterly wanting here (see Opening Brief, pp. 14-16), of inadequacy or liability to failure of existing facilities. But that is not saying that appellant's wholly adequate

and efficient facilities may be duplicated in order to create competition for its own sake alone. "For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest." *Texas & Pac. Ry.* v. *Gulf, etc., Ry., supra,* (1926) 270 U. S. 266, 278.

IV.

SUNDRY STATEMENTS IN APPELLEES' BRIEFS DEEMED ERRONEOUS OR MISLEADING.

In the briefs under reply there are a number of statements of fact and of position which we do not consider justified on the record, or which, without further explanation, might tend to mislead. To some of these reference has already been made. There are others upon which detailed comment, at any earlier stage of this brief, would have impaired the continuity of presentation, but which we yet feel require notice if the briefs are, in their sum, adequately to present the case. It has accordingly seemed necessary to assemble such matters in a summary way as a separate division of this brief.

Brief of the United States.

There are comparatively few instances of this kind in the brief of the United States, in which the differences from our position are largely as to matters of law and principally result from the variant points of view to be expected from opposing parties. The more important are the following (initial references are to pages of the brief for the United States):

(1) *Need for Coal Reserves.*—Pages 9-10: "* * * the maintaining of adequate tributary reserves by each said carrier is essential to ensure the maintaining of its revenues."

This is obviously correct so far as it goes; but the omission of any reference to the time element is apt to mislead if the statement is intended, as it appears to be,

to imply any need of the Norfolk for increasing its coal reserves. The evidence shows that the Norfolk's reserves, apart from those tributary to the Gilbert-Wharncliffe line, amount to 29,267,307,000 tons of coal, of which 12,727,147,000 is in seams over three feet thick. The evidence does not show the annual shipments of the Norfolk, but it does show that in its entire history there have been extracted 651,658,000 tons over three feet thick, which is only a little more than 5% of the coal over three feet thick and less than 3% of the total reserves (R. 227). It thus appears that the reserves will last for several hundred years.

(2) *"Bottling Up" of Virginian.*—Page 19: "* * * the Virginian 'would still be bottled up'," etc.

This figure of speech was used by the court below. It is, under the facts of the case, quite misleading. The Virginian is entirely dependent upon other carriers for a westbound outlet. If that makes it "bottled up," it will be equally "bottled up" no matter how this case is decided. But by reason of the provision of through routes to the West, and of the Commission's control of divisions, it is not "bottled up," as is most graphically shown by a westbound movement which increased from nothing before 1925 to 3,008,851 tons in 1927 (2,256,638 in nine months; R. 38). If the "bottle" is wide open, its contents are no more "bottled up" if it has one neck than if it has two.

(3) *Effect on Revenue.*—Page 19: "Moreover, the revenue situation would not be wholly cared for by the Commission control over divisions, particularly since the volume of traffic moving from mines on the Virginian may reasonably be expected to be greater if it has connection with both of its competitors in the originating of coal instead of with one only."

But the volume of traffic is determined, not by routes, but by demand, which means, in effect, markets; and there is no showing that any other markets could be reached via the Norfolk than via the appellant's line, except local points on the Norfolk's line, the business to which is "held to be negligible" (R. 39).

(4) *"Preserving" of Competition by Uneconomical Routes.*—Page 32: "But, if traffic always followed the route securing to carriers the greatest operating economies, there would have been no occasion for this suit by the C. & O. to prevent building of the Gilbert-Wharncliffe extension."

This evidences a serious misconception of appellant's theory of the case. It is with the knowledge that traffic *does not always follow* the more economic route that this suit is brought. But this does not mean that traffic *ought not* to follow the more economical route, and still less does it mean that the economy attained through opening a more economical route should be thrown away, in whole or in part, by the simultaneous creation of a less economical one.

In view of repeated references in both briefs to the importance of preserving the competition of the Norfolk, an epitome of the situation seems desirable, based primarily on the cases before the Commission, Dockets Nos. 13832 and 14454 (*Wyoming Coal Co.* v. *Virginian Ry. Co.* (1925), 96 I. C. C. 359, 98 I. C. C. 488), here referred to by stipulation (R. 226). The Virginian was built to haul eastbound coal only, and until forced to handle westbound coal it was its policy to discourage that movement (96 I. C. C. 359, 361-2; 98 I. C. C. 488, 491). The *Wyoming Case* contemplated a westbound route via the Chesapeake and Ohio. The Virginian sought to avoid this by opening the route via Matoaka

and the Norfolk, and closing the Deepwater route. This result the Commission prevented by requiring the Deepwater route to be kept open (*Wyoming Coal Co.* v. *Virginian Ry. Co.* (1928), 142 I. C. C. 681). Accordingly, the forcible conversion of the Virginian into a westbound carrier brought into being two routes to the west, both of them, so far as concerns the Virginian's part of the line, physically disadvantageous. The route via the Norfolk, so far as the Virginian's participation was concerned, was less disadvantageous than that via the Chesapeake and Ohio. Thus the Norfolk became the principal, though the unintended, beneficiary of the change of the Virginian's character from an eastbound carrier only into a two-way carrier. By the construction of its new line the Virginian has now succeeded, in its own interest and in that of the public, in substituting a good route for a poor one. But now that this is in process of accomplishment, it is proposed to impair this advantage, so far as the public is concerned, by opening another and less advantageous route, simply in order that the Norfolk may "preserve" the competition which fortuitously came into being as a result of the Virginian's being forced into the westbound business. In other words, it is proposed here, in the name of affording a cure for an existing transportation evil, to deny a complete one, and to permit the therapeutic measure to take effect only at the price of continuing in part the very condition which it was intended to heal.

(5) *Virginian's Need for "Independence"*.—Page 39: "* * * the Virginian's need for greater independence," etc.

In addition to what is said under (2) above, we would point out that even if the concept of independence admits of degrees of comparison, which may be doubted,

it is impossible to speak of "greater" independence where independence does not exist. What is doubtless meant is that the Virginian would be less dependent upon one carrier. It may be appropriate to repeat, in view of the reference to "fuller car supply and expeditious handling of the traffic," that there is no evidence whatever, nor any finding by the Commission or by the lower court, of any threatened inadequacy in either of these respects.

THE BRIEF OF THE NORFOLK.

In addition to matters already commented on, we briefly summarize the following (initial references are to pages of the Norfolk's brief):

(1) *Specification of Errors.*—Pages 6-8: Two and a half pages of the Norfolk's brief, headed "Specification by Appellant of the Assignments of Error to be Urged", are devoted to a labored effort to show non-compliance on our part with Rule 27 (e) of this Court. The first point made seems to be that a statement that all the assignments of error are relied upon does not constitute "a specification of the errors intended to be urged." If an appellant, as happens to be the case with us, intends to urge all the assignments of error, we know no more definite way of specifying them than by stating that fact.

At pages 253-5 of the record appears the statement of points on which appellant intends to rely, made pursuant to Rule 13, paragraph 9, of this Court. It clearly states the points, but in distributing them to the assignments of errors two mistakes are made which, though quite unimportant—the rule requires no such distribution—we here correct. On page 255 the words "Assignment of Errors No. 6" should read "Assignments of Errors Nos. 6 and 7", and the words "Assignment of Errors

No. 7" should read "Assignment of Errors No. 8". Assignment of Errors No. 1 is the general one that "The Court erred in making the decree" (R. 98), and is implicit in all the points.

Apart from this, the statement in the Norfolk's brief requires no reply.

(2) *Excess Operating and Capital Costs of Norfolk's Line.*—Pages 15-16: "Witness Crawford (R. 215) described the proposed method of operating over that grade and testified that it would add less than one cent a ton to the cost. Witness Marshall (R. 203) estimated the 'direct train service costs' via the route of the Chesapeake and via the proposed Gilbert-Wharncliffe line and testified that the latter would be only 90 cents per car (less than 2 cents per ton) more costly than the route of the C. & O. That witness also showed certain other expenses for the Chesapeake and Norfolk Companies (R. 191-2) from which it will appear that the costs of locomotive and freight car repairs, depreciation and retirements are greater on the Chesapeake Company than on the Norfolk Company, to an extent more than sufficient to overcome an advantage of less than 2 cents a ton."

The statement is both confused and confusing, as it relates or compares diverse and unrelated things. The "one cent a ton" testified to by Mr. Crawford was merely the cost of "doubling" over the mountain between Gilbert and Wharncliffe, and takes no account of the longer haul by that route or other operating conditions. The "90 cents a car" (nearly two cents a ton) testified to by Mr. Marshall relates to the excess direct train service costs only of operation by the Norfolk over those of appellant, computed in each case to Kenova, the common point. Neither of these figures includes

the interest and taxes arising out of the Norfolk's proposed investment of $2,500,000. Figuring these conservatively at 6 per cent, or $150,000 per annum, and assuming the movement at 2,250,000 tons (R. 245), the added cost per ton would be 6.66 cents, or $3.54 per car of 53.2 tons, the average loading (R. 170). This added to the 90 cents per car estimated by Mr. Marshall would give a minimum excess cost of transportation by the Gilbert-Wharncliffe line of $4.44 per car.

The figures of locomotive and car repairs, depreciation, and retirements referred to by the Norfolk are quite meaningless, when used for the purpose to which they are put by the Norfolk, without such supporting and explanatory data as the record does not afford. They may reflect different bases of depreciation charges, different standards of maintenance, or other variant conditions.

The paragraph as a whole is obviously intended to contradict the Commission's finding of fact (R. 56) that

> "Its (the Norfolk's) route would not be as economical for westbound traffic as a route via Gilbert and the C. & O., and requires building a line from Gilbert to Wharncliffe at a cost of $2,500,000."

(3) *Continued Use of Matoaka Route.*—Page 16: "* * * the Matoaka route * * * will be used for large tonnages unless the Wharncliffe line is constructed."

This is pure assumption. The Commission made no such finding. There is no reason why a route involving forty-eight miles of additional haul (R. 39) over unfavorable grades should be so used.

(4) *Erroneous Conception as to "Continuing" Competition.*—Page 17: "The Wharncliffe line will continue the Norfolk Company an active competitor of the Chesapeake."

This brings up the same subject dealt with above in connection with the brief of the United States. In substance it presents the argument that if two bad lines are replaced with one good one, another less good one must be added so that there will still be two. The statement has the fault, patent in both opposing briefs, of viewing the situation from the standpoint of the present arrangement, rather than from that of the arrangement which will come into being when the Virginian's line is built. Since the Gilbert-Wharncliffe line will serve no present purpose until the Virginian's line is built (R. 56), its utility can manifestly be appraised only from the standpoint of the existence of the Virginian's line.

(5) *Erroneous Statement as to Appellant's Position.* — Page 19 (after stating that appellant relies upon *Texas, etc., R. Co.* v. *Gulf, etc., R. Co.* (1926), 270 U. S. 266): "This position of the Appellant originated with the dissenting position of Commissioner Porter (R. 58-64)".

This statement, suggesting that the appellant's position was taken by way of afterthought, is surprising as coming from counsel who participated in the case before the Commission. In point of fact the identical language quoted in the Norfolk's brief from *Texas, etc. R. Co.* v. *Gulf, etc., R. Co.*, was cited by us to the Commission in the Opening Brief in the proceeding out of which this case arose at pp. 35-36, and the case was cited again in the Exception Brief at p. 59, so that it is entirely clear that the point was an integral part of the original presentation in the light of which Commissioner Porter's expression was delivered.

(6) *Inadequacy in Fact as in Law, of Reply to Appellant's Argument Concerning Wasteful Competition.*

—Pages 19-20: "This Commissioner would have denied the certificate because 'the Norfolk and Western is seeking to build into new territory adequately and efficiently served by other carriers,' a statement made under a mistake of fact. The certificate for the Gilbert-Wharncliffe line and the construction and operation of that line will not take one ton of freight or a single passenger from the Chesapeake Company's line to Gilbert now moving by that line."

The imputation of error to Commissioner Porter is scarcely fair, and the ensuing statement is somewhat wanting in ingenuousness. The statement, however, is repeated in many forms, and was, as we have seen, made the basis for a legal argument. We shall first consider its accuracy.

It is idle to suppose that Commissioner Porter was unfamiliar with the existing situation, and we do not understand it to be suggested that he would misrepresent it. He had called attention (R. 59) to the "natural barrier" formed by the mountain ridge between the Guyandot and the Tug River Valleys, constituting the dividing line between the territories served by the appellant and the Virginian, on the one hand, and the Norfolk on the other. It was in this general sense that he referred to the territory north of the ridge as being "adequately and efficiently served by other carriers." Moreover, the Commissioner would have been well justified, for the reasons hereinbefore pointed out (pp. 27-8), in treating the Virginian's new line as a *fait accompli*—a point of view from which the Commissioner's statement is thoroughly justified. It is from this standpoint that we think that counsel must have had tongue in cheek in making the further statement that the Gilbert-Wharncliffe line

> "will not take one ton of freight or a single passenger from the Chesapeake Company's line to Gilbert *now moving by that line.*"

We have italicized the "catch". It is repeated in the next paragraph in the sentence:

> "The territory of construction is not served by any carrier *at the present time*" (Italics supplied).

And counsel are at pains to make it obvious, for they say again (Brief, pp. 21-2):

> "The Gilbert-Wharncliffe line is not a duplicate of any existing line but traverses a territory which has heretofore been without railroad service. There is no evidence that the new line will take a ton of freight or a single passenger from any other existing line."

Without intending offense, we say that this is a mere quibble. Yet, as we have seen, it is made the sole basis for distinguishing the case of *Texas, etc., R. Co.* v. *Gulf, etc., R. Co.* (1926), 270 U. S. 266 and the *Utah Terminal Case* (1922), 72 I. C. C. 89, both cited by us. The familiar chord is again sounded that the Gilbert-Wharncliffe line "will not be a competing line with the Chesapeake line for a pound of freight or a passenger *now moving* over the Chesapeake line west from or east to Gilbert" (Norfolk's brief, pp. 22-23). We think it unnecessary further to labor the obvious point that the national purpose of preventing useless construction must be effectuated in the light of assured as well as of existing construction.

(7) *Horsepen Creek Area.*—Page 25: "Neither the Virginian Company nor the Chesapeake Company proposed to build a line into that territory."

The reference here is to the Horsepen Creek area. The suggested implication is that the demonstrably greater accessibility of that area to the lines of appellant and the Virginian than to that of the Norfolk is neutralized by the fact that neither the Virginian nor the appellant proposed to build a line into that territory. The tacit implication is that the Norfolk did so propose.

The implication is without foundation of fact. All the Norfolk did was to say that a branch 5 miles long, costing $600,000 *would be required* to reach the area (R. 217). It was one of a number of branches concerning which similar statements were made (R. 216-7). The Norfolk did not "propose" to build this line. And we would add that peculiar hardihood was required to make a contrary intimation, for *alone of the three applicants before the Commission did the Norfolk decline to commit itself to immediate construction* of the line which it *did* "propose" to build. The report of the Commission shows the following (R. 49):

> "The C. & O. and the Virginian would commence construction *as soon as authorized* and would complete it in about two years. The testimony for the N. & W. is that it would build the line *whenever business conditions seemed to justify it.*" (Italics supplied).

We refer also to the testimony of Mr. Crawford, General Manager of the Norfolk, upon which this finding of the Commission is based (R. 219):

"By Mr. De Jarnette: Does your railroad contemplate the building of this line immediately if the permit were granted?

"A. We would build this line whenever the business conditions seemed to justify it."

(8) *Misconception as to Record Here.*—Page 29, note: "References are sometimes made to findings of the Commission, instead of to the evidence", etc.

We call attention to this statement, somewhat apologetically made, as evidencing a singular misconception which may account for methods of treatment by the Norfolk otherwise difficult of explanation. It is apparently considered that the *evidence* before the Commission, rather than the *record* before it, constitutes the "evidence" in this suit; and from this circumstance the fact seems to be overlooked that the findings of the Commission constitute by far the more valuable part of the evidence here.

Indeed, in appellant's view, the record now before the Court is in large part wholly unnecessary, and appellant in the first instance submitted a statement of the evidence which included the report of the Commission (including Commissioner Porter's separate expression) but omitted all evidence which merely supported facts admitted in the pleadings and/or set forth in the Commission's report (R. 134). It was only at the direction of the court below, made at the instance of appellees and over the exception of appellant, that the present record, in appellant's judgment quite needlessly extended, is presented to this Court (See memorandum of evidence which appellees desired included in the record, Exhibit A, R. 113-130; appellant's responses, Exhibit B, R. 130, 132; orders of court below, R. 111-112, 246-247).

We have felt it proper thus to disclaim responsibility for the length of this record. Returning to the language of the brief here commented upon, it is doubtless by reason of the apparent conception that the evidence before the Commission, rather than its findings, constitutes the primary evidence in this suit that the Norfolk has (a) felt free, as we do not, to contradict the Commission's findings (as, for example, in respect of the excess cost of operation, etc., of the Gilbert-Wharncliffe line), and (b) undertaken to search in the evidence rather than in the findings for justification of the Commission's action.

(9) *Continuance of Routes Does Not Mean Continuance of Movement.*—Page 31: "Witness Hull . . . stated that the Matoaka route . . . 'already exists, and will continue'."

"The shippers of coal having shown a preference for a route via the Norfolk Company by sending over 80 per cent. of their westbound coal shipments via Norfolk routes, may reasonably be expected to utilize a Norfolk Company route for some substantial volume of traffic in the future."

These two statements may be briefly noticed together. As to both, it is sufficient to observe that the continuance of the *route* does not necessarily or even probably imply a continuance of the *movement,* in the face of the provision of a better route. The second is a perfect *non sequitur,* as it goes to the point of declaring that because shippers have used *one* Norfolk route in the past—and it will be remembered that prior to 1927 no other joint westbound route from Virginian local mines was open—it follows that they will use *some* Norfolk route in the future.

(10) *More About "Bottling Up" the Virginian.*—Page 39: "The Wharncliffe Line is necessary to prevent

the bottling up of the Virginian by having only one active Western outlet at Gilbert."

This graphically illustrates the inaccuracy, not to say the absurdity, of the "bottled up" figure of speech. We hazard the guess that this is the first time in the history of English speech that a thing has been said to be bottled up *by having an outlet.*

(11) *Erroneous Statement as to Application Granted by Commission.*—Page 52: "In the beginning the Norfolk and Virginian Companies made application to the Commission jointly as one line and this (F. D. No. 5161) is the application which the Commission granted to the Norfolk Company for the Wharncliffe Line (R. 240)."

This statement is not only incorrect, but in its context seriously misleading. It is made a part of the argument to show that the Virginian-Norfolk lines together form an indivisible project. The unsoundness of this conception, in the light of the Commission's order of October 20, and for other reasons, has been demonstrated. But let us examine the statement just quoted.

In the first place, the application made by the Norfolk and the Virginian was *not* the application which the Commission granted in part to the Norfolk. The Guyandot and Tug River Railroad Company filed an application, in which the Norfolk and the Virginian joined, on October 29, 1925. On December 24, 1926,* the Guyandot and Tug River filed an amended application, *in which only the Norfolk joined* (R. 33). The order was entered, of course, on the amended, not the original, application.

*The record in this case, following the official report (Construction by Virginian & Western Ry. Co. (1928), 145 I. C. C. 167) gives this date as December 24, 1925 (R. 33), but this is a mistake. As an appendix to this brief we print a certificate from the Secretary of the Commission showing the fact.

The simple explanation of the filing of the amended application lies in the case known as Finance Docket No. 4943, *Control of Virginian Railway* (1926), 117 I. C. C. 67, the report of which, by stipulation (R. 226), can be referred to herein. That case deals with a proposed lease of the Virginian to the Norfolk, the application for an order authorizing which was filed with the Commission July 2, 1925 (117 I. C. C. at p. 68), and was pending at the time the original application was filed. On October 11, 1926, the Commission denied the application and entered an order to that effect (117 I. C. C. 67-85). It thus appears that the Norfolk and the Virginian joined in the original application in the contemplation that their properties would be unified, and that the amended application of the Norfolk, in which the Virginian did not join, was filed after it had become known that this could not be done. The Virginian's separate application was filed January 21, 1927 (R. 33). It thus results that the inference of an indivisible project, manifestly sought to be established by the language quoted from the Norfolk's brief, is not only without foundation, but that the circumstance of the separate filing of the amended application by the Norfolk after the Virginian's lease had been denied emphasizes the fact that the lines were, in truth, wholly separate projects.

V.

CONCLUSION.

The heart of this case, as appellant urges upon the Court, was revealed with admirable succinctness by Commissioner Porter in his dissenting expression. We conclude by pointing to his language, which follows in part:

> "Search may be made of this record in vain to find a scintilla of evidence justifying a finding that the present or future public convenience and necessity require, or will require the construction of this 10.5 miles of railroad. I am abundantly confirmed in this statement by the fact that a search of the opinion of the majority will reveal but a single paragraph even hinting at a reason for this construction. I propose to quote from that paragraph:
>
> > " 'The construction of that part of the N. & W.'s proposed line from Wharncliffe to Gilbert would enable the N. & W. to compete with the Chesapeake & Ohio for westbound traffic from the Guyandot Valley and would assure operators in the territory competive service to the west.'
>
> "This is new and strange doctrine for this Commission to announce as a sole reason for new construction. As far back as in Public-Convenience Application of Utah Terminal Ry., 72 I. C. C. 89-93, wherein it was stated, that the applicant's main contention that a competing line is necessary in order to furnish interstate service in the movement of coal, we said:

" 'So long as the available supply of coal can promptly reach the consuming public over existing lines, it is difficult to perceive how public convenience and necessity can be served by the establishment of competing facilities. "Public convenience and necessity" has been defined as a "strong or urgent public need," Wis. Telephone Co. v. Railroad Comm., 162 Wis. 383; 156 N. W. 614. A public need can hardly be predicated upon the demand of three shippers who may desire to introduce the element of competition in order to improve their position in their own competitive field. While one of the purposes of the Transportation Act, 1920, was to preserve competition between carriers, the provisions of paragraphs (18) to (20), inclusive, of section 1 negative any presumption that it was the purpose of Congress to permit the construction of new and competitive lines of railroad where existing facilities are adequate or can be made so by the exercise of available administrative remedies.'

" * * * This sole reliance of the majority was effectively answered by Commissioner Woodlock in Construction of Lines in Eastern Oregon, supra, where he said:

" 'Congress has enjoined upon the Commission the duty of "preserving competition" so far as possible in the grouping of railroads through consolidation. If, however, it had desired to introduce yet more "competition" into the industry, through control in the hands of this Commission over new construction and extensions, it would doubtless have instructed us to that effect, instead of referring us to "public convenience and necessity" as the test to be applied to new projects. "Competition" means alterna-

tive service available to a shipper or a district; it implies existence at all times of more facilities than are actually needed to move the traffic. The law clearly contemplates that railroad plant in existence shall, as a whole, receive a "fair return" from the rates. It is impossible, therefore, to avoid the conclusion that when Congress gave us power to govern new construction it did so with the intent that we should prohibit the building of unnecessary new facilities. New facilities become necessary when existing facilities become inadequate. "Monopoly" is not necessarily synonymous with inadequacy. "Competitive" facilities are not "necessary" merely because they are "competitive." Doubtless, every shipper is ready at all times to welcome another railroad into his territory; doubtless every railroad is ready at all times to enter another railroad's territory and share the business that the other has developed; doubtless no railroad desires a new "competitor"; these are all very natural states of mind. But somebody must pay for the new facilities and they must be supported by the rates.'

"To sum up, then, we have a situation where the construction by the Virginian of this link between Itmann and Gilbert will form a splendid arrangement for traffic originating thereon as well as for some Chesapeake & Ohio coal moving eastbound to tidewater from the Lower Guyandot Valley and Virginian coal moving westbound from the Upper Guyandot Valley. The service will be complete and for aught we know will be fully adequate to meet the needs of shippers along the line. Assuming for the moment that the line as so constructed is in operation. Under the power conferred upon us by paragraph (18) of Section 1, as so ably interpreted in Texas & Pac. Ry. v. Gulf, Etc., Ry., 270 U. S. 266, as follows:

" 'but where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier; like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the public interest.'

"we should and undoubtedly would consider very carefully the proposed entry of another line at a cost of two and one-half millions of dollars to be added to the financial structure upon which a fair return should be earned. In this case the majority conceive, even before the Virginian's line is built, that another carrier will be 'required' in the public interest to serve this territory. In this conception they rely, not upon the claim of any prospective shipper, or shippers, but apparently upon the theory that competitive service might prove desirable and with a hint that construction of the line by the Norfolk & Western might induce it 'to permit the exploitation of the lands of the Pocahontas Company, provided it received the westbound tonnage therefrom at Wharncliffe.'

"On the question of competition I agree wholeheartedly with the remarks of Commissioner Woodlock in the Oregon Case which I have quoted. If 'exploitation' of the Pocahontas Company coal lands is to be dependent upon haulage of the coal by the Norfolk & Western, it may be that its exclusion from this territory will have the wholesome effect of avoiding the over-production suggested by this carrier on brief as a possible reason for denying all of the applications.

"I am unable to distinguish the facts and the law here under consideration from that dealt with by the Supreme Court of the United States in Texas & Pac. Ry. v. Gulf, Etc., Ry., supra. It will be recalled that in that case the Santa Fe wished to build a line into an industrial district, 2½ miles west of the city of Dallas, Texas, theretofore not reached by any of its lines but which was being served by the Texas & Pacific. In that case, the Santa Fe was seeking to build into new territory, adequately and efficiently served by another carrier. Here the Norfolk & Western is seeking to build into new territory, adequately and efficiently served by other carriers. There, they sought to build a line 7½ miles in length, involving but two small trestles and numerous ordinary fills and cuts. Here they seek to build 10½ miles over a high mountain ridge. There they sought to build at a cost of $500,000. Here they seek to build at a cost of $2,600,000. Here the majority hold that, for competitive reasons, the line may be built. As for me, I prefer to follow the reasoning of the Supreme Court and our own holdings and deny this construction."

Respectfully submitted,

HERBERT FITZPATRICK,
ROBT. B. TUNSTALL,
THOMAS L. PRESTON,
Counsel for Appellant.

Richmond, Va.,
January 14, 1931.

Appendix

INTERSTATE COMMERCE COMMISSION

WASHINGTON

I, GEORGE B. MCGINTY, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the amended application of the Guyandot and Tug River Railroad Company, for authority to construct a line of railroad in Wyoming and Mingo Counties, West Virginia, Finance Docket No. 5161, was filed on December 24, 1926, the application being joined in by the Norfolk and Western Railway Company only. The statement in the official report of the case, which is embraced in Finance Docket No. 6067, *Construction of Line by Virginian and Western Railway Company*, 145 I. C. C. 167, at page 168, that the said amended application was filed December 24, 1925, is a typographical error, the correct date being as stated above, December 24, 1926.

Seal of Interstate Commerce Commission.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 12th day of January, A. D. 1931.

(S) GEORGE B. MCGINTY,
Secretary of the Interstate Commerce Commission.

Office Supreme Court, U.
FILED
DEC 16 1930
CHARLES ELMORE CROP

FILE COPY

No. 73

In the Supreme Court of the United States

OCTOBER TERM, 1930

CHESAPEAKE & OHIO RAILWAY COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, GUYANDOT & TUG RIVER RAILROAD COMPANY, NORFOLK & WESTERN RAILWAY COMPANY, AND INTERSTATE COMMERCE COMMISSION, APPELLEES

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

THOMAS D. THACHER,
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NELSON THOMAS,
For the Interstate Commerce Commission.
DANIEL W. KNOWLTON,
Of Counsel.

JANUARY, 1931.

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 73

CHESAPEAKE & OHIO RAILWAY COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, GUYANDOT & TUG RIVER Railroad Company, Norfolk & Western Railway Company, and Interstate Commerce Commission, Appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINION BELOW

The opinion of the specially constituted District Court is reported in 35 F. (2d) 769. (R. 80.)

The report of the Interstate Commerce Commission (R. 31) is reported in 145 I. C. C. 167.

ABBREVIATIONS

Petitioner, Chesapeake & Ohio Railway Company, will sometimes hereinafter be referred to as

the C. & O. The Virginian Railway Company and its subsidiary, the Virginian & Western Railway Company, will sometimes hereinafter be referred to as the Virginian, applying that name indifferently to the parent company and its subsidiary. The Norfolk & Western Railway Company and its subsidiary, the Guyandot & Tug River Railroad Company, will sometimes hereinafter be referred to as the N. & W., applying that name indifferently to the parent company and its subsidiary.

QUESTIONS

By its order in the above-mentioned proceeding, involving applications by the C. & O., by the N. & W., and by the Virginian, for authority to construct lines of railroad in West Virginia, all of which would have covered the stretch along the Guyandot River between Itmann, a station on the Virginian, and Gilbert, a station on the C. & O., the Commission granted to the Virginian authority to construct a line from Itmann to Gilbert, and to the N. & W. authority to construct a line extending from a connection with its main line at Wharncliffe to a junction with the authorized line of the Virginian at or near Gilbert; denied the N. & W.'s application as to that portion of its proposed line which would have extended beyond Gilbert along the Guyandot River; and denied the C. & O.'s application *in toto*. The applicant railroads serve a large coal-producing territory in southern West Virginia. The Virginian's lines extend only to the east, but its shippers have outlets to the west over

routes made both in connection with the C. & O. and the N. & W. Those routes are circuitous, and the Virginian's authorized new line along the Guyandot with terminus at Gilbert, on the C. & O., will afford a more direct route for westbound coal, but only in connection with the C. & O. The Wharncliffe extension, which the Commission authorized the N. & W. to build, will make the direct route available to shippers in connection with the N. & W. as well as the C. & O. The C. & O.'s petition (dismissed by the court below) sought to have set aside that part only of the Commission's order which authorized the Wharncliffe extension.

The questions in issue before this court are:

1. Whether the lower court could, as asked of it, have assumed jurisdiction to enjoin the Commission's authorization for the extension from Gilbert to Wharncliffe separately from its authorization of the line from Itmann to Gilbert, since, if it had prevented construction of the Wharncliffe extension without restraining construction of the line from Itmann to Gilbert, the result would have been to substitute a plan of construction different from that administratively authorized by the Commission in disposing of a single traffic problem?

2. Whether the authority granted by the Commission to the Norfolk & Western to build the Wharncliffe extension subjected the C. & O. to such legal injury as entitled it to institute and maintain the suit?

3. Whether the Commission's order was supported by substantial evidence?

4. Whether the Commission, in reaching a determination that proposed extensions of lines of railroad are required by the public interest, may properly consider, among other things, the desirability of preserving competition between rival railroad systems?

STATUTE INVOLVED

The pertinent statutory provisions are paragraphs (18), (19) and (20) of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act, 1920, c. 91, 41 Stat. 456, 477, 478 (U. S. C., Title 49, Sec. 1 (18), (19), (20)), which read as follows:

> (18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any

portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance

of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

STATEMENT

1. PROCEEDINGS BEFORE THE COMMISSION

The Commission's order, a portion of which is here assailed, was entered in proceedings instituted by three separate applications, filed by the C. & O.,

by the N. & W.[1] and by the Virginian,[2] for certificates under section 1 (18) of the Interstate Commerce Act that the public convenience and necessity require the construction and operation of certain proposed lines of railroad in southern West Virginia described in the respective applications.

The extensive coal-mining districts of southern West Virginia are served by the three railroad systems above named. The lines of all three systems extend to the Atlantic Seaboard and the lines of the C. & O. and the N. & W. extend also to middle west gateways. Coal producers on the Virginian, however, have no outlet for western shipments except over routes made in connection with the C. & O. or the N. & W. Such shipments move via junction with the C. & O. at Deepwater, W. Va., the northern terminus of the Virginian, or via junction with the N. & W. at Matoaka, near the southeastern limit of the coal fields.

The C. & O.'s application, filed May 7, 1925, was for authority to construct an extension of its Logan subdivision in the Lower Guyandot Basin from Gilbert eastwardly along the Guyandot River to a junction with the Virginian at Mullens, and thence beyond Mullens to Stone Coal on its Winding Gulf Branch. (R. 32.) The N. & W.'s application, filed October 29, 1925, and amended December 24, 1925,

[1] Application filed by subsidiary Guyandot & Tug River Railroad Company and joined in by parent company.

[2] Application filed by subsidiary Virginian & Western Railway Company and joined in by parent company.

was for authority to construct a line extending westwardly from Elmore, a station on the Virginian in the Upper Guyandot Basin, along the Guyandot River to within about one mile of Gilbert, and thence across the divide to a connection with its main line at Wharncliffe. (R. 33, 34.) The Virginian's application, filed January 21, 1927, was for authority to construct a line from Itmann, on its Guyandot River branch, westwardly along the Guyandot River to a connection with the C. & O. at Gilbert. (R. 33.) There was no railroad along the Guyandot River between Itmann and Gilbert. All the proposed lines would have covered this stretch, which is about 40 miles in length. The C. & O.'s proposed lines would also have extended from Itmann about 12 miles eastwardly to Stone Coal, on its Winding Gulf branch. This extension would have closely parallelled an existing line of the Virginian. The N. & W.'s proposed line, in addition to covering the stretch along the Guyandot River to a point about one mile from Gilbert, on the C. & O., would have extended thence 10.5 miles southwestwardly across the divide to a connection with its main line at Wharncliffe. (R. 34; Map R. 16.)

The principal function of the proposed lines of all three carriers was the same, namely, to provide an outlet for westbound coal and other traffic, originating in the Upper Guyandot Basin east of the main line of the Virginian, over routes which would be less circuitous and freer from adverse grades

than the existing routes. The natural and direct outlet for such traffic was over a line which would extend from a connection with the Virginian westwardly along the Guyandot River (R. 34; Map R. 16), and, as hereinabove shown, the proposed lines of all three carriers followed this outlet. In 1927 coal moved westbound from this region at the annual rate of 4,444,464 tons, of which the greater proportion originated on lines of the Virginian. Nearly 80 per cent of westbound coal originating on the Virginian was shipped via Matoaka and the lines of the N. & W. The balance moved via Deepwater and the lines of the C. & O. (R. 38, 39, 92.)

A further function of the proposed lines was to carry the traffic that would be developed in the territory traversed thereby. That part of the Guyandot basin, lying west of the line of the Virginian and east of Gilbert, contains extensive deposits of coal, a large area of land bearing merchantable timber, about 30,000 acres of cultivated lands, 3,000 acres of pasture lands and a population of 6,500. The proposed route along the Guyandot River would pass through several towns not served by any railroad. (R. 35.) Of special importance to the applicant carriers was the enlargement of the coal reserves tributary to their respective systems which would be effected by the proposed extensions of their lines. Coal constitutes a very large proportion of the traffic of the three carriers (R. 49) and, consequently, the maintaining of adequate tributary reserves by each

said carrier is essential to ensure the maintaining of its revenues. The Virginian's tributary coal reserves are less than those of either of the two other carriers. While the N. & W.'s reserves are seven times as large as the Virginian's, they are only about 60 per cent as large as those of the C. & O. (R. 55.) To protect its coal reserves the N. & W. acquired in 1901, and has since maintained, control of the Pocahontas Coal & Coke Company which owns about 82,500 acres of coal lands that would be tributary to the proposed line along the Guyandot River. (R. 36, 55.)

Between Itmann and Gilbert both the Virginian and the N. & W. owned rights of way covering nearly all of their proposed routes. The C. & O.'s proposed location was made largely on the rights of way of the other applicants. (R. 48.) People of the local territory considered that the Virginian would afford them the most suitable outlet. (R. 54, 57.) More than two-thirds of the coal moving to the west from the Upper Guyandot Basin originated on the lines of the Virginian (R. 55), and that road already owned and operated a branch line extending part way down the Guyandot River from Mullens to Itmann. However, the Virginian's proposed line, covering alone the stretch from Itmann to Gilbert, would afford a direct route for westbound coal only in connection with the C. & O., whereas the longer line proposed by the N. & W., extending beyond Gilbert to Wharncliffe, on the main line of the N. & W., would make the direct

route available to shippers in connection with the N. & W. as well as the C. & O. Under the existing status of lines 80 per cent of westbound coal, originating on the Virginian, moved via Matoaka and the lines of the N. & W., and it was estimated by the N. & W. that a saving of 14 cents per ton would be effected by use of the proposed route down the Guyandot and extension to Wharncliffe. (R. 42.) Furthermore, there are large deposits of coal on Gilbert and Horsepen Creeks, estimated at from 120,000,000 to 170,000,000 tons, that would be tributary to the proposed Wharncliffe extension. (R. 91, 226, 229.)

The applications of all three carriers were, without objection, heard together. The Commission considered them as a whole in its report and disposed of them by one order. (R. 31–66.) By its order the Commission granted to the Virginian authority to build a line extending from Itmann down the Guyandot River to Gilbert, and to the N. & W. authority to build a line extending from a connection with the authorized line of the Virginian, at or near Gilbert, to Wharncliffe on its main line; denied the N. & W.'s application as to that portion of its proposed line which would have extended along the Guyandot River; and denied the C. & O.'s application *in toto*.

2. PROCEEDINGS IN COURT BELOW

December 8, 1928, appellant, C. & O., filed its petition to enjoin that portion only of the Commis-

sion's order which authorized the N. & W. to build the line connecting the authorized line of the Virginian with the N. & W.'s main line at Wharncliffe. January 3, 1929, the case was argued and submitted as on final hearing on the application for permanent injunction. November 16, 1929, the Court rendered its opinion upon final hearing. (R. 80.) December 14, 1929, final decree was entered dismissing the petition. (R. 97.)

SUMMARY OF ARGUMENT

I

The lower court properly held that it could not, as appellant requested, enjoin that part of the Commission's order which authorized the construction of the Gilbert-Wharncliffe line where no relief was sought as against the remainder of the order authorizing construction of the Itmann-Gilbert line. The two authorizations are interdependent, giving effect to a single administrative plan of lines; so that, if the Court had prevented the one part of the construction without preventing the other part, the result would have been to substitute a plan of lines different from that authorized by the Commission in disposing of a single traffic problem.

II

The appellant is without standing to maintain this suit to set aside authority granted the N. & W. to build the Gilbert-Wharncliffe line. The build-

ing of that line will deprive the appellant of a prospective competitive advantage which it would have had by reason of the fact that otherwise it would have been the sole carrier to connect with, and to receive westbound traffic from, the authorized Itmann-Gilbert line of the Virginian at its western terminus. Its interest, growing out of that prospective competitive advantage, entitled it to oppose in the Commission's proceeding the granting to the N. & W. of authority to build the Gilbert-Wharncliffe line, and to intervene in any suit brought under the Urgent Deficiencies Act, c. 32, 38 Stat. 208, 220, to set aside the authority after it had been granted. But it had no legal right to be the sole carrier to connect with, and to receive westbound traffic from, the authorized line of the Virginian at its western terminus, and, therefore, the Commission's order did not subject it to legal injury, entitling it to institute and maintain an independent suit attacking the validity thereof.

III

The Commission's order rests, not only upon the consideration that the preservation of competition between the N. & W. and C. & O. for westbound traffic originating on the Virginian will be in the public interest, but also upon a well rounded record of evidence, which is considered at length in the Commission's report.

IV

The Transportation Act, 1920, does not contemplate that the Commission should close its eyes to the benefits that may be secured for the public by the installation of competitive service any more than it contemplates that the Commission should disregard the harm that possibly might result from wasteful and improvident competition.

ARGUMENT

I. JURISDICTION CONFERRED BY URGENT DEFICIENCIES ACT TO ENJOIN A COMMISSION ORDER "IN PART" IS NOT APPLICABLE WHERE THE WHOLE ORDER RESTS UPON A SINGLE ADMINISTRATIVE PLAN

The Commerce Court Act (36 Stat. 539) conferred upon the Commerce Court jurisdiction over "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." The Urgent Deficiencies Act (38 Stat. 219) transferred that jurisdiction of the Commerce Court to the several District Courts of the United States.

In *Procter & Gamble Co.* v. *United States,* 225 U. S. 282, it was held that the jurisdiction to set aside "any order"[3] of the Commission did not

[3] Valuation orders, orders relating to procedure and orders entered under Sec. 209 Transportation Act, 1920, have also been held not to be subject to the jurisdiction of the courts under the Urgent Deficiencies Act. *Los Angeles Valuation Case,* 273 U. S. 299; *United States* v. *Illinois Central,* 244 U. S. 82; *N. Y., O. & W. Ry.* v. *United States,* 14 F. (2d) 850, 273 U. S. 652; *Great Northern R. Co.* v. *United States,* 277 U. S. 172.

apply to a negative order, that is, an order which, as distinguished from an affirmative order requiring or authorizing some act to be done by the carriers, merely dismisses the proceeding and thereby denies the administrative relief prayed for. This holding was based on the ground, among other grounds, that the assumption by the courts of jurisdiction to grant relief in respect of orders of a character that leave the administrative status unchanged would be contrary to the legislative purpose in that such a jurisdiction would necessarily encroach upon the discretion in administrative matters, which Congress had exclusively entrusted to the Commission (pp. 295 to 299). Judicial review even of affirmative orders is confined to the legal questions as to whether there have been violations of the Constitution, a want of conformity to statutory authority, or an arbitrary exercise of power conferred.[4] But the setting aside on purely legal grounds of an affirmative order, requiring or authorizing some change in administrative status, would grant effective relief because the existing administrative status would thereby be maintained, whereas in order to grant relief (other than merely

[4] *Kansas City Southern Ry. Co.* v. *United States*, 231 U. S. 423, 439; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 483, 489; *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547; *Intermountain Rate Cases*, 234 U. S. 476, 490; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 562.

declaring the law [5]) in respect of a negative order that leaves the administrative status unchanged, a court would have to substitute its judgment upon the administrative question.

Appellees submit that for the same reason the jurisdiction of a District Court to enjoin a Commission order "in part" applies only to a severable part of an order; and not to a part of an order that rests upon administrative considerations entering into the determination inducing the making of the balance of the order. For example, where an order prescribes reasonable rates between various points and there is no issue of rate relationship involved; each of its parts fixing rates between particular points would appear to be severable for purpose of a separate injunction suit. But, where the Commission, in reducing the rates of rival localities, has ordered like reductions to both localities with the consideration in mind of preserving an existing rate relationship, it is clear that, if a court were separately to enjoin the reduction in rates to one locality, the reduction in rates to the other locality left outstanding and in force would no longer have the support of the Commission's administrative judgment. [6]

In the instant case appellant, C. & O., has not attacked the Commission's order in so far as it

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[5] *Piedmont & Northern Ry.* v. *United States*, 280 U. S. 469.

[6] See comment in *United States* v. *Merchants, etc., Asso.*, 242 U. S. 178, 188, with respect to the enjoining of a portion only of a Commission order.

authorized the Virginian to construct the line of railroad from the Upper Guyandot Basin to a connection with the lines of appellant at Gilbert. Its petition sought to have set aside that part only of the Commission's order which authorized its competitor, the N. & W., to build the extension beyond Gilbert to a connection with N. & W. lines at Wharncliffe. It is apparent that the one part of the Commission's order is not so severable from the other part for purpose of a separate injunction suit because the two parts of the order give effect to a single administrative plan, that is, because the building of the line to Gilbert was authorized in contemplation of the building of the extension to Wharncliffe.

Emphasizing the need for the Wharncliffe extension the Commission said:

> "The construction of that part of the N. & W. proposed line from Wharncliffe to Gilbert would enable the N. & W. to compete with the C. & O. for westbound traffic from the Guyandot Valley, and would assure operators in the territory competitive service to the West. * * *" (R. 57.)

Shippers from the Upper Guyandot Basin now have outlets to the west over routes which, while being circuitous and having adverse grades, are made both in connection with the C. & O. and the N. & W.; and in 1927 nearly 80 per cent of all westbound coal originating on the Virginian was shipped via the lines of the N. & W. Construction

of a line terminating at Gilbert would afford a direct outlet from the Upper Guyandot Basin only in connection with the C. & O., whereas the further construction of the Wharncliffe extension would make the direct outlet available to shippers in connection with the N. &.W. as well as the C. & O. In short it would preserve for them the advantages of competitive service, including the advantages of additional routes to Kenova, Cincinnati, Columbus and other Ohio River gateways, of a fuller car supply and of a generally more expeditious movement of the traffic.[7]

The Commission, in summarizing its reasons for granting to the Virginian rather than to the C. & O., or to the N. & W., authority to build that section of the authorized new construction consisting of the line along the Guyandot River, said, among other things:

> "The Virginian needs its proposed line in order to have greater independence in the matter of an outlet for westbound coal. It appears that it can have no suitable outlet to the west except down Guyandot River, and it is not desirable to put the ownership of the line through this narrow mountain valley or gorge under the control of one of its competitors. * * *" (R. 56.)

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[7] Several outlets and ample car supply are of vital importance to producers of coal, particularly during periods of heavy coal movement.

As pointed out by the lower court, the Virginian "would still be bottled up if the only connection at Gilbert was with the C. & O., and the authorization of the Gilbert-Wharncliffe line seems to have been a means, in the minds of the members of the Commission, to prevent such condition." (R. 96.) Since coal originating on the C. & O. is in active competition with coal originating on the Virginian it is clear that an outlet for westbound coal over the C. & O. alone could not have been expected to secure for the Virginian and its shippers the independence which the Commission considered to be necessary.

Appellant asserts that the Virginian will not be "bottled up" if its sole connection at Gilbert is with the C. & O. "because its only interest in westbound traffic—divisions—is controlled by the Commission." The "independence in the matter of an outlet for westbound coal" referred to by the Commission relates not only to carrier revenue but to efficient through service rendered to producers of coal on the Virginian, namely, additional routes, a fuller car supply and prompt movement of the traffic. Moreover, the revenue situation would not be wholly cared for by the Commission control over divisions, particularly since the volume of traffic moving from mines on the Virginian may reasonably be expected to be greater if it has connection with both of its competitors in the originating of coal instead of with one only.

Furthermore, the maintaining of carrier revenue is of vital concern to the public convenience and necessity, for a carrier's ability to continue to render proper service to the public depends thereon. The revenues of all three carriers involved in the Commission proceeding are derived chiefly from the transportation of coal. While the tributary coal reserves of the N. & W. are much larger than those of the Virginian, they are only 60 per cent as large as those of the C. & O. (R. 55.) The N. & W. now receives a large amount of revenue from its participation in the westbound movement of coal from the Upper Guyandot Basin (R. 38, 39, 92), of which it would in large part have been deprived, if the court had prevented it from building the Gilbert-Wharncliffe extension while at the same time leaving the Virginian free to build the line from the Upper Guyandot Basin to a connection at Gilbert with the C. & O. only. The Commission, by authorizing the Virginian to build the line down Guyandot River to Gilbert, recognized that carrier's needs for additional coal reserves and for a more suitable outlet for westbound coal originating on its present lines.

Moreover, although the C. & O.'s application for authority to build a line down Guyandot River was denied, the line, as built by the Virginian, will connect with C. & O. lines at Gilbert, thereby enabling the latter to share in the westbound movement of coal originating along the new line of the Virginian and to continue to share in the westbound move-

ment of coal originating in the Upper Guyandot Basin. By authorizing the N. & W. to build the extension beyond Gilbert to a connection with its line at Wharncliffe, the Commission intended to afford the N. & W. substantial equality of opportunity to share in the westbound movement of coal originating along the new line of the Virginian and to continue to share in the westbound movement of coal originating in the Upper Guyandot Basin. (R. 57.) In short the Commission's order as a whole gives effect to its administrative judgment as to the respective traffic needs of the carriers, and the nice balance in this particular thereby established, would be destroyed if the one part of its order were set aside, leaving the other part outstanding and in force.

In view of the facts above mentioned, and others disclosed by the Commission's report, it must be concluded that the authority given the N. & W. to build the Gilbert-Wharncliffe extension involved considerations entering into the Commission's determination to authorize the building of the Itmann-Gilbert line. From which it follows that, if the lower court had separately enjoined the one part of the Commission's order, the other part left outstanding and in force would no longer have had the support of the Commission's administrative judgment. Certainly it cannot be said that, if the Commission had known that the one part of its order would be enjoined, it still would have prescribed the exact plan of lines contained in the

balance of its order. Under such circumstances it might, for example, have considered that its reasons for authorizing the Virginian to build and own the line along the Guyandot River should not be given controlling weight and, accordingly, it might have authorized the N. & W. to build the line along the river to Gilbert as well as the extension beyond to Wharncliffe. It might further have conditioned such authority upon the granting of trackage rights to the Virginian. (R. 56.)

The court could, of course, have entertained a suit to enjoin the Commission's order as a whole, for the enjoining of both parts of the Commission's order would merely have maintained the existing status of lines, giving the administrative body opportunity to determine upon a different plan. But, if the court had, as asked of it, enjoined that part of the order authorizing the Gilbert-Wharncliffe extension, leaving separately in force that part of the order authorizing the construction of the Itmann-Gilbert line, there would have resulted a new status of lines, unauthorized by the administrative body and disturbing to the traffic situation.

II. THE AUTHORITY GRANTED TO THE N. & W. TO BUILD THE LINE FROM GILBERT TO WHARNCLIFFE DID NOT SUBJECT THE C. & O. TO LEGAL INJURY, ENTITLING IT TO INSTITUTE AND MAINTAIN THE SUIT

The appellant, in effect, rests its right to maintain this suit to set aside that part of the Commission's order authorizing the N. & W. to construct the line from Wharncliffe to a connection

with the Virginian's authorized Itmann-Gilbert line, upon the ground (in substance) that the N. & W. will thereby be enabled to compete for traffic that would otherwise be exclusively enjoyed by the C. & O., namely, westbound traffic originating on the authorized line of the Virginian and westbound traffic that will be moved over that line from the Upper Guyandot Basin. (R. 14, 15.) But the appellant's showing that the Commission's order will deprive it of a prospective economic advantage by enabling its rival, the N. & W., to continue to compete effectively for westbound traffic originating on the Virginian is not enough to support its standing to maintain this suit.

Hines et al. v. *United States et al.*, 263 U. S. 143, was a suit brought to set aside as void an order of the Commission cancelling a penalty charge exacted by carriers on lumber held at reconsignment points. The penalty charge had been originally established by the Director General of Railroads "to prevent undue detention of equipment under the present emergency." Following Federal control it had been continued in modified form by the carriers in their tariffs. The penalty charge imposed a much greater handicap upon jobbers, who had no lumber yards, than on lumber manufacturers and dealers who customarily shipped direct from the mills to their own lumber yards. Plaintiffs in the case belonged to the latter class and their claim of right to maintain the suit was grounded primarily on the injury resulting to them from the Commission's

order arising out of the fact that the jobbers were thereby relieved from the handicap of the penalty charge. This Court in holding that they were without standing to maintain the suit said at page 148:

> "* * * But plaintiffs could not maintain this suit merely by showing (if true) that the Commission was without power to order the penalty charges cancelled. They must show also that the order alleged to be void subjects them to legal injury, actual or threatened. This they have wholly failed to do. It is not alleged that the carriers wish to impose such charges and, but for the prohibition contained in the order, would do so. For aught that appears carriers are well satisfied with the order entered. Cancellation of a charge by which plaintiffs' rivals in business have been relieved of the handicap theretofore imposed may conceivably have subjected plaintiffs to such losses as are incident to more effective competition. But plaintiffs have no absolute right to require carriers to impose penalty charges. Compare *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88, 111. Plaintiffs' right is limited to protection against unjust discrimination. * * *"

In *Alexander Sprunt & Son Inc., et al.*, v. *United States et al.*, 281 U. S. 249, involving a suit to set aside a Commission order which, by requiring a readjustment of rates, had deprived appellants of a competitive advantage enjoyed under existing rates, the Court said at page 254:

> * * * We are of opinion that appellants have no standing, in their own right, to make this attack. In so far as the order directs elimination of the rate differential previously existing, it worsened the economic position of the appellants. It deprived them of an advantage over other competitors of almost 3.5 cents per hundred pounds. The enjoyment of this advantage gave them a distinct interest in the proceeding before the Commission under section 3 of the Interstate Commerce Act. For, their competitive advantage was threatened. Having this interest, they were entitled to intervene in that administrative proceeding. And if they did so, they became entitled under section 212 of the Judicial Code to intervene, as of right, in any suit "wherein is involved the validity" of the order entered by the Commission. But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order. * * *

The same doctrine has been applied in a suit brought, as in the instant case, by one carrier to set aside an order, entered by the Commission under section 1 (18) to (20) of the Interstate Commerce Act, authorizing another carrier to construct an "extension of its line of railroad." In *Pennsylvania Railroad Co.* v. *United States et al.*, 40 F. (2d) 921, there was involved an order of the Com-

mission granting an application of the Pittsburgh & West Virginia Railway for authority to extend its line into Donora, Pa., which community was then being served exclusively by the Pennsylvania Railroad. The latter had intervened in the Commission proceeding in opposition to the application and, after the authority was granted, it brought suit under the Urgent Deficiencies Act to set aside the order. The court dismissed the bill upon the ground, among other grounds, that the Pennsylvania Railroad was without standing to maintain an independent suit. In discussing this feature the court said (p. 925):

> * * * Being threatened by the Pittsburgh & West Virginia Railway Company, through its proposed extension, with competition for traffic in the Donora district, the Pennsylvania Railroad Company undoubtedly had such an interest in the application for the extension as entitled it to intervene and be heard. It did intervene and was heard. But that interest alone did not give it a right to maintain an independent suit to set aside the Commission's order. Such a suit can be brought and maintained by a competitor only where some right of its own has been violated by the order. SPRUNT & SON, INC. *vs.* UNITED STATES — * * * decided April 14, 1930. True, the complainant now is and for a long time has been exclusively serving Donora and is now receiving the profits from handling all the traffic flowing into and out of that busy district,

> But that is a privilege rather than a right—a privilege to be enjoyed so long as it shall last, not a right to be asserted,—unless it be found somewhere in the law—written or unwritten. Certainly there is no unwritten law that gives a carrier, first to serve a community, the right to hold its traffic against all competitors. It is equally certain that the written law—the Transportation Act of 1920—does not explicitly or implicitly accord a non-competitive traffic area to the first taker as the law accords a trade mark to the first adopter. * * *

Similarly in the case now before this court, while the appellant, C. & O., had an interest in the subject matter of the Commission's order, "that interest alone did not give it a right to maintain an independent suit to set aside" the order. Amendments added to the Interstate Commerce Act by Transportation Act, 1920,[8] require the carriers, before undertaking construction of new lines, to obtain the Commission's certificate that such construction is or will be required by the public convenience and necessity. But this provision can not be said to give to the C. & O. the right to be the sole carrier to connect with the authorized line of the Virginian at or near Gilbert and to receive through traffic from that authorized line when built. The C. & O. now has a line extending into Gilbert with which the authorized line of the Virginian will connect. By reason thereof it would enjoy a

[8] Section 1 (18)–(20) quoted above at page 4.

competitive advantage, if the N. & W.'s proposed connecting line should not be built, whereas, if it were built, it would not enjoy the competitive advantage. Its interest in that prospective competitive advantage entitled it to oppose in the Commission proceeding the N. & W.'s application for authority to build the connecting line, and to *intervene* in any suit brought under the Urgent Deficiencies Act[9] to set aside the Commission's order, authorizing the building of the line.

Furthermore, such prospective competitive advantage might have made it a "party in interest" entitled under section 1 (20) of the Interstate Commerce Act to enjoin the building of the line, if the Commission's authority therefor had not in fact first been obtained. Compare *Texas & Pacific Railway* v. *Gulf etc., Railway*, 270 U. S. 266. But the building of the line has been authorized by the Commission. And there can not be implied from provisions of law, which commit to the discretion of the administrative body the question as to whether proposed new lines are required by the public interest, the creation of rights in individual carriers to maintain suits attacking the validity of authority for the building of new lines granted

[9] Sec. 212 Judicial Code, which it was said in *Sprunt & Son* v. *U. S.*, *supra*, gave the plaintiff the right to intervene in, but not to institute, a suit to vacate a Commission order, was originally contained in the Commerce Court Act and is now applicable in suits under the Urgent Deficiencies Act. (U. S. C. Tit. 28, sec. 45a.)

thereunder to other carriers. The soundness of this is made particularly clear by giving consideration to analogous provisions of the Interstate Commerce Act, requiring the carriers to obtain administrative permission before undertaking the doing of other acts.

Section 20a of the Act forbids issuance by the carriers of any new securities until the Commission, after investigating the purposes of the proposed issue, by order grants its authority therefor. Assume that authorized securities of a carrier were to be used for the purpose of improving its existing service, or of strengthening its financial position generally, the carrier would thereby be enabled more effectively to compete with a rival carrier. The rival carrier would have an interest in the Commission's order authorizing issuance of the securities, for its economic situation would be worsened by the strengthening of that of its competitor. But clearly no legal right of the carrier would have been infringed, entitling it to sue to set aside permission given to another carrier to issue securities.

Section 5 of the Act imposes upon the Commission the duty of determining upon a plan for the consolidation of the rail carriers of the country into a limited number of systems, and requires carriers desiring to consolidate to obtain the Commission's authority therefor. Assume that a consolidation authorized by the Commission should

include a line which other carriers, planning to consolidate, desired to include in their system. The latter carriers could have appeared before the Commission in opposition to the inclusion in the rival system of the line in controversy, because their prospective economic interest would be involved. But it is apparent that they could not maintain a suit to set aside the Commission's order authorizing the consolidation, because they would be unable to show that the order had subjected them to legal injury. They could assert neither a right to have the carrier excluded from the rival system nor a right to have it join in their system.[10]

III. THE COMMISSION'S ORDER RESTS UPON SUBSTANTIAL EVIDENCE OF RECORD IN THE PROCEEDING

The C. & O.'s contention that there was no substantial evidence to support the authority granted the N. & W. to extend its line from Wharncliffe to a connection with the proposed line of the Virginian at or near Gilbert is apparently premised (1) upon the assumption that the Commission relied solely upon the consideration that the preservation of competition between the N. & W. and C. & O. for westbound traffic originating on the

[10] In *Chicago Junction Case*, 264 U. S. 258, involving an order of the Commission under section 5(2) of the Act authorizing the New York Central to acquire control of the Chicago Junction Railway, the standing of the Baltimore & Ohio and other carriers to attack the order was upheld because the order caused them injury by depriving them of the equality of treatment to which carriers are "as fully entitled as any shipper." See Sec. 3(3) Interstate Commerce Act.

Virginian would be in the public interest, and (2) upon its view that the Commission had misinterpreted the law in giving weight to that consideration.

The Commission necessarily and properly gave consideration to the fact that, if the Virginian was to be authorized to build the direct line down the Guyandot River to Gilbert, the building of the extension beyond Gilbert to a connection with the N. & W. would be essential in order to preserve in connection with the direct line the advantages to shippers of two routes and competitive service to the west, and in order to enable the N. & W. to share in westbound traffic originating on and moving over the direct line. But its report shows that other elements bearing upon its problem of what plan of lines would best serve the public interest were also given careful consideration.

1. The contentions made by the C. & O. to demonstrate that the Gilbert-Wharncliffe line is not required in the public interest show that its complaint of lack of any evidence is, in reality, a complaint as to the weight given by the Commission to the evidence before it

Coal produced in the Upper Guyandot Basin now moves westward at the annual rate of about 4,500,000 tons, of which the greater proportion originates on the lines of the Virginian. (R. 38, 39.) There are two routes available to the west, the one being via Matoaka and the lines of the N. & W. and the other being via Deepwater and the lines of the

C. & O. These routes are circuitous and have adverse grades. Coal shipped via Matoaka must ascend the long grade on the Virginian from Elmore to Clarks Gap, which rises 1,125 feet, with a maximum rate of 2.07 per cent and then move over a section of the N. & W. upon which the maximum grade is 1.10 per cent. (R. 39, Map R. 16.) Evidence submitted by the N. & W. (R. 213–214) and considered by the Commission (R. 42) showed that a proposed line from Elmore down the Guyandot River to Gilbert with extension beyond to Wharncliffe would reduce operating costs by about 14 cents per ton as compared with the costs over the route via Matoaka. (R. 213 to 214.)

The C. & O., however, contends that this evidence does not show that the Gilbert-Wharncliffe extension is required by the public interest, because the route via Gilbert and its line beyond would afford still greater economies in operation. But, if traffic always followed the route securing to carriers the greatest operating economies, there would have been no occasion for this suit by the C. & O. to prevent building of the Gilbert-Wharncliffe extension. In view of the fact that shippers on the Virginian now ship nearly 80 per cent of all westbound coal via Matoaka and the lines of the N. & W. it may be reasonably assumed that more traffic will move over the route down Guyandot River, if that route is made available both in connection with the N. & W. and the C. & O., than if it is made available in connection with the C. & O. only. To the

extent that shippers may continue to use the Matoaka route if the Gilbert-Wharncliffe extension is not built, the use of the direct outlet down Guyandot River will be curtailed and the full operating economies contemplated by the Commission's plan of lines will be prevented.

As bearing upon the transportation need for the Gilbert-Wharncliffe line for other than through traffic, the evidence showed that there were large deposits of coal on Gilbert and Horsepen Creeks, estimated at from 120,000,000 tons to 170,000,000 tons. The C. & O. contends that these coal deposits can be reached from either its line or the authorized line of the Virginian with equal facility. But there was testimony in the record that the deposits could best be developed by the Gilbert-Wharncliffe line or by a short branch extending from that line up Horsepen Creek. (R. 91, 226, 229.)

Furthermore, the record, considered generally, shows that the Commission had before it estimates of the traffic tributary to the present and proposed lines of the three carriers, figures with respect to present movements of traffic and estimates of future movements and earnings, evidence with respect to the physical features of the present and proposed lines, and estimates of the economies in operation expected to be accomplished by the installation of the proposed lines. As heretofore said, a large volume of coal now moves westbound from the Upper Guyandot Basin by two routes, the one made over the N. & W. and the other over the

C. & O. To the end of economical operation this traffic should move over the authorized line of the Virginian to Gilbert (R. 38), and the traffic that line will deliver to connecting carriers at Gilbert will be greatly augmented by traffic (chiefly coal and lumber) originating in the territory tributary thereto. (R. 35.)

All the above evidence was considered at length in the Commission's report and entered into its ultimate determination and finding that the public convenience and necessity required or will require the construction of the Gilbert-Wharncliffe line.

In *Colorado* v. *United States,* 271 U. S. 153, there was involved a Commission order authorizing, under the same provisions of the Act as are herein involved, abandonment by a carrier of a branch line of railroad. There this Court said, in referring to the discretion reposed in the Commission (p. 168):

> * * * The sole test prescribed is that abandonment be consistent with public necessity and convenience.

Earlier in the opinion the Court had said (p. 166):

> * * * The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission.

In *Texas & Pacific Ry.* v. *Gulf etc., Ry.,* 270 U. S. 266, 273, this Court said that the question as to whether construction of a new line of railroad was

required by the public convenience and necessity was one for the administrative judgment of the Commission.

The various reasons advanced in appellant's brief (pages 32 to 41) to demonstrate that the evidence does not show that the line, connecting the N. & W. with the authorized line of the Virginian, is required by the public convenience and necessity resolve themselves into the one argument, that it is not so required because appellant's own connecting line is all that is required by the public convenience and necessity. In short, appellant is asking in effect, that the Court weigh the evidence and substitute its judgment for that of the Commission.

2. The public convenience and necessity may require construction of a line of railroad for the purpose of preserving an equality of opportunity between rival carriers to compete for traffic, and for the purpose of preserving, or securing, for shippers the advantages of competitive service

It has been above shown that the two parts of the Commission's order, the one authorizing the Virginian to build the Itmann-Gilbert line, and the other authorizing the N. & W. to build the extension beyond Gilbert to a connection with its line at Wharncliffe, give effect, among other things, to the Commission's judgment as to the respective traffic needs of the carriers. The building of the Itmann-Gilbert line will enable the Virginian, which has greater need for additional tributary coal reserves than the other carriers, to increase its reserves sub-

stantially. Since that line will connect at Gilbert with the C. & O., the latter will be enabled to share in the westbound traffic originating on the authorized Itmann-Gilbert line and also in the westbound traffic moving over that line from the Upper Guyandot Basin. The N. & W.'s tributary coal reserves are only 60 per cent as large as those of the C. & O. A great part of its westbound coal traffic transported from the Upper Guyandot Basin via Matoaka, from which it is now receiving a large revenue, will be diverted to the direct route of the proposed Itmann-Gilbert line. By authorizing the N. & W. to build the Gilbert-Wharncliffe line the Commission intended to afford the N. & W. substantial equality of opportunity to compete with the C. & O. for westbound traffic originating on the Itmann-Gilbert line and moving over that line from the Upper Guyandot Basin.

It seems clear that it was necessarily within the power of the Commission, in determining what plan of lines was required by the public convenience and necessity to have regard for the present and future traffic needs of the carriers. The public convenience and necessity are intimately concerned with the maintenance of a carrier's financial stability, for upon that will depend its ability to continue to render efficient service.

As to the effect of the building of the Gilbert-Wharncliffe line upon the C. & O., which now has an established line extending into Gilbert, with which the authorized Itmann-Gilbert line will con-

nect, it should be kept in mind that the traffic which will come to it over the Itmann-Gilbert line is not traffic now enjoyed by the C. & O. but is new traffic that will be developed on a new line authorized by the same order that authorized the Gilbert-Wharncliffe line, and traffic from the Upper Guyandot Basin that will be diverted by the new line from present routes—in large part from the route via Matoaka and the lines of the N. & W.

But even in the usual case of a carrier seeking to protect established business from invasion by another carrier, authority for the invading line granted by the Commission to the other carrier with the consideration in mind of enabling it to compete for the business, could not be attacked for lack of power in the Commission. True, the main objective of the provisions concerning new construction of lines is to prevent the building of unnecessary new lines (Texas & Pac. Ry. v. Gulf, etc., Ry., 270 U. S. 266, 277 [11]), because such would needlessly increase the aggregate property value upon which rates exacted from the public are required to be based. But the question as to whether a line is unnecessary (not "required by the public convenience and necessity") is a question of fact for the administrative determination of the Commission. (*Ibid.* p. 273.)

[11] In this case the building of a new line was enjoined because undertaken without the administrative authority of the Commission.

Since the invasion by one carrier of the territory of another necessarily establishes competition, the power given the Commission to authorize such invasion of itself negatives the idea that the benefits that may be obtained by establishing competition are not among the elements to be considered by the Commission. As emphasized by appellant, the paragraphs of the Act empowering the Commission to authorize new construction are among the interrelated provisions enacted by Transportation Act, 1920, with the main objective of promoting an efficient general transportation service for the public. But Section 15 (6), added by said Act, empowers the Commission to fix divisions of joint rates so as to give a weaker road "a division larger than justice merely as between the parties would suggest in order to maintain it in effective operation as part of an adequate transportation system." *Orient Divisions Case*, 265 U. S. 274, 284, 385. And Section 15a, added by said Act, provides for the recapture of excess earnings from the stronger carriers and the making of the fund available for the needs of weaker carriers. *Dayton-Goose Creek Case*, 263 U. S. 456, 479–480. Accordingly, it would not seem to be out of harmony with the spirit and purpose of the Transportation Act for the Commission, in authorizing a new line, to give consideration to the fact that it would enable the carrier to meet its traffic and revenue needs by competing for business with another carrier.

Similarly, there is nothing in the Act indicating that the Commission, when authorizing construction of a new line may not give consideration to the fact that the new line would secure for the shipping public the advantages of competitive service. Under the present status of lines, shippers in the Upper Guyandot Basin enjoy the advantages of two routes and competitive service to the west. The authorized line of the Virginian from Itmann to Gilbert will afford a more direct and economical outlet for the traffic. At Gilbert there will be connection with the C. & O., and the authorized extension beyond Gilbert to the line of the N. & W. will preserve for shippers, in connection with the direct outlet, the advantages of competitive service to the west.

The Commission gave as one of its reasons for authorizing the Virginian, rather than the C. & O. or the N. & W., to build the Itmann-Gilbert line, that the ownership of the line should not be under the control of one of its competitors because of the Virginian's need for greater independence in the matter of an outlet for westbound coal. (R. 56.) Such independence would not be secured, if the line's only connection at Gilbert was with the C. & O., whose producers of coal are active competitors of producers of coal on the Virginian. Competitive connecting lines at Gilbert were necessary to assure to the Virginian the independence regarded as necessary by the Commission, and to its shippers the advantages of additional routes, a

fuller car supply and expeditious handling of the traffic.

Although the Federal regulatory laws recognize that a considerable degree of monopoly is proper in the railroad business, nevertheless they likewise recognize that the restraints upon excessive charges and the stimulus to good service that result from competition can not be wholly replaced by regulation. Sections 7, 10 and 11 of the Clayton Anti-trust Act [12] (U. S. Code Title 15, sections 18, 20, 21) bear witness to the purpose to keep competition between carriers alive. Furthermore, one of the principal directions given by Congress to the Commission to guide the latter in formulating a plan for consolidation of the railways into a limited number of systems was that:

> "In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and chanels of trade and commerce shall be maintained." (I. C. Act, section 5(4).)

The Commision has, in other cases, recognized that the benefits growing out of competitive service are elements to be considered in authorizing construction of new lines. In *Construction of Lines in Eastern Oregon,* 111 I. C. C. 3, it was said at page 37:

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[12] For history of, and discussions under, this Act see Interstate Commerce Act, Annotated, Vol. 4, page 3057 et seq.

"* * * The advantages of a diversified car supply, recognized in the coal industry, are equally important to lumber producers. There are the possibilities of failures of operation or of management, calamities, labor disturbances, and surplus production or consumers' demands upon one railroad which might well be overcome if the service of another carrier were available. * * * Competition as a stimulus for efficient operation has been recognized by us."

In *Construction of Line by Wenatchee Southern Railway Co.*, 90 I. C. C. 237, it was said at page 256:

"It is probable that the competition afforded (by the construction of the proposed line) would stimulate the Great Northern to further improve its service. Competition, within reason, rather than monopoly, is in the public interest."

While, under some circumstances, the invasion by one carrier of territory served by another may be detrimental to the public interest, under other circumstances the reverse may be true. The question is one of fact, committed to the administrative discretion of the Commission. Clearly the Transportation Act, 1920, does not require the Commission to close its eyes to the benefits that may be secured for the public by the establishment of competitive service, any more than it expects it to close its eyes to the possible harm that may result therefrom. On the contrary it expects the

Commission to weigh all elements bearing upon the public interest in reaching a determination as to whether or not a proposed line is required by the public convenience and necessity.

CONCLUSION

The decree of the lower court denying the prayer for injunction and dismissing the petition for want of equity should be affirmed.

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JANUARY, 1931.

U. S. GOVERNMENT PRINTING OFFICE: 1931

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CHARLES ELM

No. 73.

OCTOBER TERM, 1930.

IN THE

Supreme Court of the United States

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, GUYANDOT AND TUG RIVER RAILROAD COMPANY, AND NORFOLK AND WESTERN RAILWAY COMPANY,
Defendants-Appellees.

REPLY BRIEF FOR GUYANDOT AND TUG RIVER RAILROAD COMPANY AND NORFOLK AND WESTERN RAILWAY COMPANY, DEFENDANTS-APPELLEES.

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DECEMBER, 1930.

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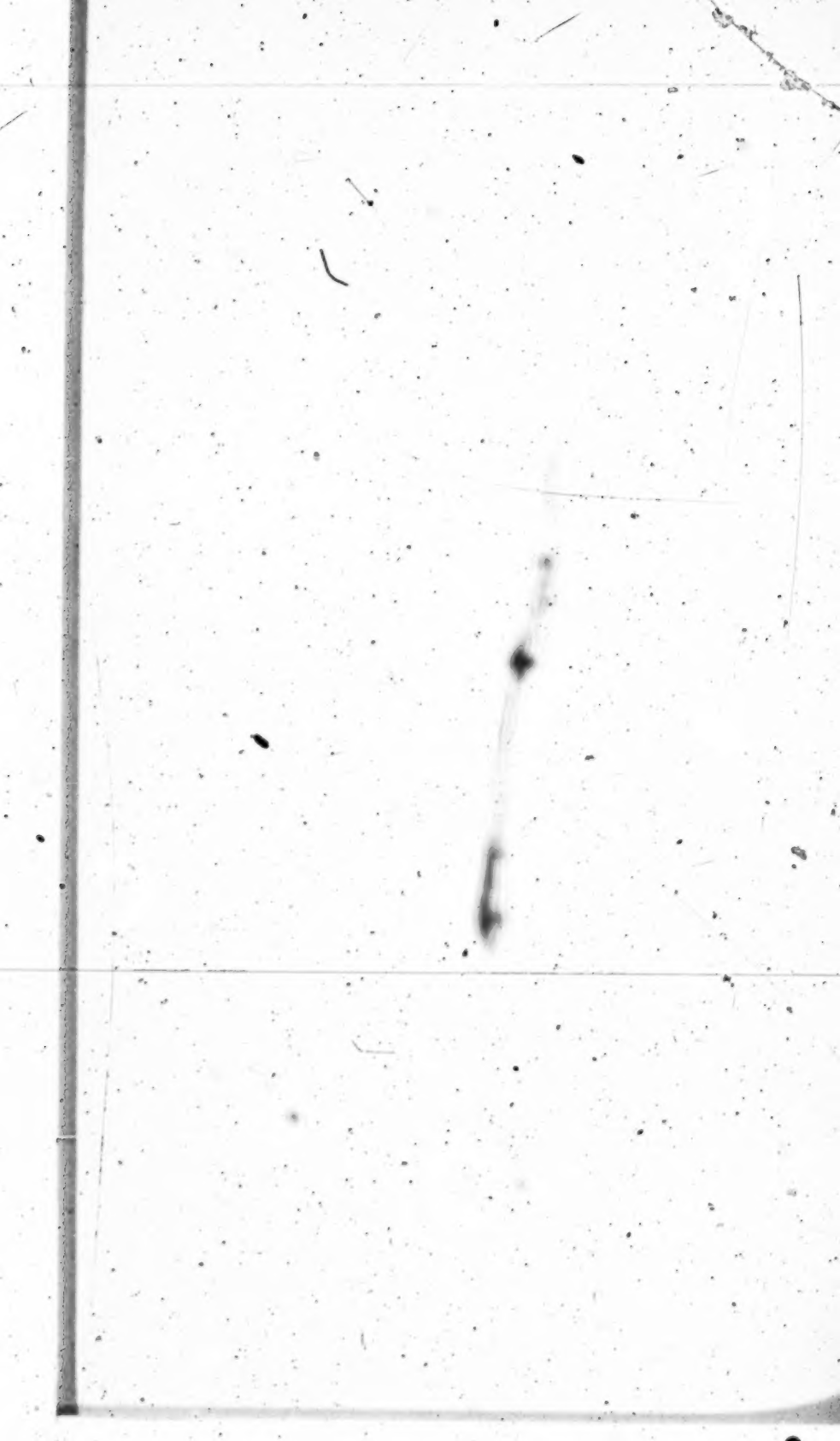

In the Supreme Court of the United States.

No. 73 of October Term, 1930.

Chesapeake and Ohio Railway Company, Plaintiff-Appellant,

v.

United States of America, Guyandot and Tug River Railroad Company, and Norfolk and Western Railway Company, Defendants-Appellees.

REPLY BRIEF FOR GUYANDOT AND TUG RIVER RAILROAD COMPANY AND NORFOLK AND WESTERN RAILWAY COMPANY, DEFENDANTS-APPELLEES.

COUNTER STATEMENT OF THE CASE.

A counter statement is deemed necessary to correct inaccuracies or omissions which we con-

ceive exist in the statement of the case by the Chesapeake and Ohio Railway Company.

On May 7, 1925, the Chesapeake and Ohio Railway Company filed, under Paragraph (18), Section 1, Interstate Commerce Act, an application with the Interstate Commerce Commission (F. D. 4818) for a certificate of public convenience and necessity for the construction of a railroad from the terminus of its Logan sub-division near Gilbert, W. Va., in an easterly direction 47.3 miles to a point near Mullens, W. Va., and an extension of its Winding Gulf Branch from its terminus near Stonecoal, W. Va., westerly to a point near Mullens, 8.2 miles, where the two extensions would join. This did not cover the Railroad now in question.

On October 29, 1925, the Guyandot and Tug River Railroad Company, a subsidiary of the Norfolk and Western Railway Company, with the Norfolk and Western Railway Company and the Virginian Railway Company joining, filed an application (F. D. 5161) for a certificate of public convenience and necessity to construct a line of railroad from a connection with the Virginian Railway Company near Elmore westwardly down the Guyandot River to Gilbert and thence to Wharncliffe, about 53 miles, including the 10½ miles (Gilbert-Wharncliffe) now in controversy. An amended application

was filed December 24, 1925, by the Guyandot and Tug River Railroad Company and the Norfolk and Western Railway Company for the same Line, 53 miles.

On January 21, 1927, the Virginian and Western Railway Company filed an application, the Virginian Railway Company joining, for a certificate to authorize the construction of a line of railroad from the terminus of the Virginian Railway Company on the Guyandot River near Itmann down the River to Gilbert, about 40.6 miles.*

The line along the Guyandot River sought by each of the applicants between Gilbert and Mullens, Elmore or Itmann was the same in location in a narrow valley; but only the Norfolk Company and its subsidiary sought authority to build a line of railroad between Gilbert and Wharncliffe.

The three applications were heard in the same hearing, in the sequence of the dates of the applications. The Examiner announced that "all parties can refer to any testimony or statements in the transcripts as long as they relate to the one general subject" and recited the stipulation as "by all parties that all evidence

*For brief reference we shall hereafter designate the Chesapeake and Ohio Railway Company as the Chesapeake Company; the Norfolk and Western Railway Company and its subsidiary the Guyandot and Tug River Railroad Company as the Norfolk Company; and the Virginian Railway Company and its subsidiary the Virginian and Western Railway Company as the Virginian Company.

taken in the transcript shall be equally available to all parties and may be considered by the Commission in disposing of each and all of the applications"; (R. p. 113).

The Virginian Company supported that part of the Norfolk's application which sought authority for the Gilbert-Wharncliffe line. The only opposition to the construction of that line has come from the Chesapeake Company.

The three applications were covered by the Commission in one report and disposed of by one certificate and order of 23rd July, 1928, (145 I. C. C. 167).

The certificate granted to the Virginian Company the right to construct its line in the main Guyandot Valley from Itmann to Gilbert; to the Norfolk Company to build that portion of its proposed line extending from Gilbert to Wharncliffe; denied the application of the Norfolk Company as to other matters; and denied *in toto* the application of the Chesapeake Company; (145 I. C. C. 167); (R. pp. 64-66).

The Chesapeake Company petitioned the Commission for reconsideration and reargument of the entire proceeding, and that petition was denied (R. pp. 242-3). Then, accepting the decision as to the line from Itmann to Gilbert, the Chesapeake Company filed its further petition for

reconsideration and reargument as to the certificate granted to the Norfolk Company for the Gilbert-Wharncliffe line. Pending consideration of that petition, the effective date of the certificate and order was postponed insofar as it authorized the Gilbert-Wharncliffe line (R. p. 243); but the petition was denied and the certificate and order was made effective November 1, 1928 (R. p. 244). The order required the Norfolk and Virginian Companies to commence work on the authorized lines prior to January 1, 1929, and complete the railroad on or before December 31, 1931 (R. p. 240).

A petition for injunction (R. pp. 1-31) was filed by the Chesapeake Company on 8 December, 1928, in the District Court for the Southern District of West Virginia, to restrain and set aside only that part of the certificate and order of the Commission of 23 July, 1928, and of subsequent orders, which authorized the construction of the Gilbert-Wharncliffe line by the Norfolk Company. This case was heard January 3, 1929, on the application for a preliminary injunction, by a three-Judge Court under The Urgent Deficiencies Act of 22 October, 1913, and was at that hearing submitted by consent of all the parties as on final hearing for a permanent injunction; (R. pp. 78-80).

On November 16, 1929, the District Court denied the injunction and dismissed the petition of the Chesapeake Company: 35 Fed. (2d) 769. Final Decree December 14, 1929 (R. p. 97). From the decree of the District Court the Chesapeake Company obtained an appeal to this Court. There was no supersedeas. The order of the Commission of July 23, 1928, is now and has been in effect since November 1, 1928; (R. p. 86).

SPECIFICATION BY APPELLANT OF THE ASSIGNMENTS OF ERROR TO BE URGED.

The eight Assignments of Error are printed in the Record, pp. 98-101, and reprinted as an Appendix to the Brief of the Appellant, pp. ix-xii. At page 28 of the Brief of the Appellant is the statement that "all are relied upon."

The rule of this Court (Rule 27, sub-division (*e*)) requires "a specification of such of the assigned errors as are intended to be urged." The specification on page 28 of the Appellant's Brief doesn't specify any particular assigned error and asserts that the Assignments of Error challenge the validity of the certificate by "the Commission upon the respective grounds

stated therein, which, summarily stated, are: (1) that neither the findings of the Commission and the court nor the evidence in the record afford any substantial support for the Commission's order; (2) that the record proves the construction complained of in this suit to be contrary to the public interest and to have been authorized under an erroneous theory of the applicable law; and (3) that the decision of the court below that authority for the Virginian's Itmann-Gilbert line was contingent upon construction of the Guyandot's Gilbert-Wharncliffe line was erroneous because squarely in conflict with conclusive proof to the contrary."

Here also there is no specification to distribute the three grounds relied upon and associate them with particular Assignments of Error.

Neither in the Summary of Argument (pp. 29 to 46 of the Appellant's Brief) nor in the Argument (pp. 46 to 68 of the Appellant's Brief) is there reference by number to the Assignments of Error with which the points are sought to be associated.

In the "Statement of Points on which Appellant Intends to rely" (R. pp. 253-5) Errors I and VIII are not mentioned and Errors II to VII of the Assignment of Errors are associated with Points as follows:—

Assignment No. II:—

No evidence to justify the Certificate:

Assignment No. III:—

The Record proves that the construction will be contrary to public convenience and necessity:

Assignments Nos. IV and V:—

Certificate without authority of law because "based upon an erroneous conception and theory of the law" in that the Commission's action "was solely based upon the naked finding that the construction thereby authorized would promote competition between carriers and assure competitive service" without any evidence or finding that "such promotion of competition or assurance of competitive service was or will be required by present or future public convenience and necessity."

Assignment No. VI:—

Certain evidence found by the District Court as sufficient to support the order was not so in fact or in law:

Assignment No. VII (seemingly a mistake for Assignment VIII):—

The order was separable as to the Wharncliffe Line.

ARGUMENT.

I.

(Assignments of Error II, III, IV, V, VI and VII.)

The evidence established that the Wharncliffe Line was essential for the public convenience and necessity:—

(1) As affording and maintaining the existing carrier competition by an alternative outlet Line to the West for traffic originating on existing lines:

(2) As affording required service for the territory traversed by the proposed new line:

(3) As enabling the Virginian Company to attain the expected profitable use of its new Line in the Guyandot Valley:

(4) As enabling the Norfolk Company to make economies in the transportation of coal to the West from Virginian mines:

(5) As enabling the Norfolk Company to participate in the new business originating in the Guyandot Valley along the new line of the Virginian Company:

(6) As securing freedom of outlet to the west for the Virginian Company.

(Point 3, Appellant's Brief, pp. 32-41; Assignments of Error Nos. II, III, IV, V and VI—(see R. pp. 253-5).

If there is any substantial evidence upon which the Commission's administrative jurisdiction can act this Court will not substitute its judgment for that of the Commission: MANUFACTURERS' RAILWAY v. U. S., 246 U. S. 457.

A presentation of the evidence supporting the award of the certificate here follows:—

(1) *The Wharncliffe Line is necessary to preserve the existing competitive status of the Norfolk and Chesapeake Companies for the westbound movement of coal originating on existing lines.*

(Assignment of Error VI:—Point 2 of the Summary of Argument (p. 30) and Point 2 of the Argument (p. 51) in Appellant's Brief.)

The existing lines of the Virginian Company extend from Norfolk, Va., on the east to the West Virginia coal fields, with several branches in the coal fields upon which coal is produced and shipped (R. p. 34). During the first nine months of 1927, there were in operation on its lines 47 coal mines served by it alone (called local mines) and 55 coal mines served also by the Chesapeake Company (called joint mines), and those mines produced and shipped coal via the Virginian Railway during that period

amounting to 9,211,045 tons, or at the rate of about 12,281,528 tons per annum (R. p. 160).

The Virginian has no rails extending west from the coal fields. During the first nine months of 1927, 3,203,793 tons of coal originated by it (equal to about 4,271,724 tons per annum) moved via other railroads to western destinations (R. p. 160).

For the movement of coal from some of the origins on existing lines of the Virginian to the west, the Commission several years ago required the establishment of joint rates via the following routes: (1) Via the Virginian to Deepwater, W. Va., and thence via the Chesapeake and its connections; and (2) Via the Virginian to Matoaka, W. Va., and thence via the Norfolk Company and its connections. Wyoming Coal Co. *et al. v.* Virginian Ry. Co. *et al.*, 96 I. C. C. 359 and 98 I. C. C. 488; (R. pp. 136-7, 237). The orders in that case covered only rates from a few specific origins on the Virginian and similar joint rates were voluntarily established by the Virginian and Norfolk Companies via the Matoaka route from all mines served by the Virginian, local or joint mines. The Chesapeake Company and the Virginian Company also voluntarily established similar rates

via the Deepwater route from all local mines served by the Virginian and from such of the joint mines as were located between destinations and a local mine; but the Chesapeake Company refused to permit the establishment of joint rates via Deepwater from 27 joint mines which were not intermediate because that carrier also serves those mines with its own route to the West, and would be short-hauled via the Virginian route (R. pp. 146, 237).

The Chesapeake Company and the Norfolk Company, as connecting carriers of the Virginian via the Deepwater and Matoaka routes respectively, are active competitors for the movement of all coal originating on the Virginian Railway and destined to the West (R. pp. 138-9).

Both of the existing routes (via Matoaka and via Deepwater) have disadvantages. For example, from the principal origin territory on the Virginian (the Winding Gulf District) the line of that carrier to Deepwater and so west via Chesapeake Company crosses over three summits with adverse grades ranging from 1.10 to 1.65 per cent. against the loaded movement and 1.60 to 2.02 per cent. against the return empty movement of coal cars (R. p. 39). The route via Matoaka is about 41 miles longer than the pro-

posed route via Gilbert and Wharncliffe, and encounters an adverse grade against loaded movements of 2.07 per cent. on the Virginian and 1.10 per cent. on the Norfolk (R. p. 39).

The evidence is undisputed that a route down the Guyandot River to Gilbert, and thence west either via existing lines of the Chesapeake or the proposed Wharncliffe line (now sought to be enjoined) will be better than either of the existing routes through Deepwater or Matoaka for the movement of coal originated by the Virginian on its existing lines (R. pp. 38, 232).

The Norfolk Company's route has in the past secured approximately 80 per cent. of that traffic. Of the 3,203,793 tons moved during the first nine months of 1927, 2,741,331 tons moved via Matoaka (R. pp. 158-9).

The Commission ruled (R. pp. 56-7) that "The Virginian needs its proposed line in order to have greater independence in the matter of an outlet for westbound coal," and that "The construction of that part of the N. & W's proposed line from Wharncliffe to Gilbert would enable the N. & W. to compete with the C. & O. for westbound traffic from the Guyandot Valley."

The District Court on this phase of the justification for the line now in controversy, at pages 775-6 of its opinion (R. pp. 93-4), said:—

"The N. & W. and C. & O. are active competitors for the shipment of this amount of 4,000,000 tons, heretofore mentioned, which now originates on the Virginian lines to the west. Naturally, the Virginian would want to have the longest haul possible of this tonnage, and would therefore like to haul it from the point of origin of each ton to the end of its line at Gilbert. Without the construction of the Gilbert-Wharncliffe line, all of this coal tonnage would have to be delivered at Gilbert to the C. & O. The construction of this short line would leave the C. & O. and N. & W. upon the same competitive basis as they are at present, and would give to the Virginian what the I. C. C. evidently thought was its rightful portion of the revenue derived from the shipment of this coal. This is simply carrying out the apparent public policy indicated by Congress by the passage of the Interstate Commerce Act.

"It is claimed by the plaintiff that the C. & O. afford the 'natural' and most economical route for the movement west from Gilbert, and characterizes the proposed Wharncliffe route as a 'poor' one, having 'heavy grades' and being uneconomical and wasteful, but the I. C. C. evidently found to the contrary, and in our opinion, when all the facts are taken into consideration, there

is no doubt about the rightfulness of its conclusions."*

The Chesapeake Company urges that this competition should not be permitted because the route of the Chesapeake west from Gilbert is better and more economical than the route of the N. & W. via the Gilbert-Wharncliffe line. In this context, in its injunction petition, it characterizes the Gilbert-Wharncliffe line as "poor" having "heavy grades" and economically wasteful (R. p. 11). The evidence (Exhibit No. 25, R. pp. 208-9) shows that the maximum adverse grade will be 1.04 per cent. for a distance of about five miles. Witness Crawford (R. p. 215) described the proposed method of operating over

* In parallel columns in this note we present the characterization of the Wharncliffe Line in the Brief of the Chesapeake Company in the District Court in the case at bar for contrast with the characterization of the same Wharncliffe Line in the Brief of the Chesapeake Company filed in opposition to the granting of a certificate to the Virginian Company for the construction of a bridge at Deepwater (F. D. 7562).

Page 118 of brief for Chesapeake Co. in F. D. 7562 filed with I. C. C. Oct. 24, 1929:

"Upon the whole record it is conservative to say that the westbound route of the C. & O. via Gilbert will be a route of extraordinary efficiency, capable of handling all traffic that may be offered it; and if the Gilbert-Wharncliffe Line is built another route, almost as efficient will be available."

Page 30 of Brief for Chesapeake Co. filed in District Court, dated Jan. 3, 1929:

"On the contrary, the facts thus far related—the cost of the line, its heavy grade, the necessity for doubling and the excessive cost of its operation, as contrasted with the superior grades, lesser cost of operation and entire adequacy of the Logan Subdivision—appear conclusively to demonstrate the useless wastefulness of the proposed construction."

that grade and testified that it would add less than one cent a ton to the cost. Witness Marshall (R. p. 203) estimated the "direct train service costs" via the route of the Chesapeake and via the proposed Gilbert-Wharncliffe line and testified that the latter would be only 90 cents per car (less than 2 cents per ton) more costly than the route of the C. & O. That witness also showed certain other expenses for the Chesapeake and Norfolk Companies (R. pp. 191-2) from which it will appear that the costs of locomotive and freight car repairs, depreciation and retirements are greater on the Chesapeake Company than on the Norfolk Company, to an extent more than sufficient to overcome an advantage of less than 2 cents a ton.

The new route via Wharncliffe would be more economical and advantageous than the existing route through Matoaka and the Matoaka route must be continued and will be used for large tonnages unless the Wharncliffe line is constructed. The economies which will result from the substitution of the Gilbert-Wharncliffe route for that traffic alone are sufficient to justify the construction of the line in controversy. It is not important that greater economies might result from the use of the Chesapeake's route for diversion of the traffic to a route of the Chesapeake is not practicable.

of convenience and necessity of more transportation service for those inside reaching out and those outside reaching in."

The Chesapeake Company relies upon TEXAS & PAC. RY. v. GULF, ETC., RY., 270 U. S. 266. At page 277 this Court said that "competition between carriers may result in harm to the public as well as in benefit." This language recognizes that the creation or continuance of competition may justify a certificate. The question is for the Commission on substantial evidence in the exercise of its administrative discretion in each particular case, and in the present case it has found, from convincing evidence, that the preservation of the existing competition is required by the public convenience and necessity.

This position of the Appellant originated with the dissenting opinion of Commissioner Porter (R. pp. 58-64). This Commissioner would have denied the certificate because "the Norfolk and Western is seeking to build into new territory adequately and efficiently served by other carriers," a statement made under a mistake of fact. The certificate for the Gilbert-Wharncliffe Line and the construction and operation of that line will not take one ton of freight or a single passenger from the Chesapeake Company's line to

Gilbert now moving by that line. The objection of the Chesapeake Company arises from a desire to divert to its own route as much as possible of the tonnage of coal now moving from Virginian mines to the West via Matoaka Junction and the Norfolk route. The Chesapeake's claim (R. p. 245) of $450,000.00 loss is based upon the hope of snatching from the Norfolk Company all or most of the transportation from Virginian sources now enjoyed by the Norfolk route.

The territory of construction is not served by any carrier at the present time. The Wharncliffe Line was authorized in part by the Commission because, as the District Court neatly observed (35 Fed. (2d) 773), "This, in effect, would result in continuation of approximately the same conditions now existing." Continuing, not creating, competition is the result of the Wharncliffe certificate.

So much for Appellant's positions upon the evidence. Now let us look at some of the authorities cited in B-2 of the Appellant's Brief and see whether they apply to such a status as in the case at bar.

At p. 58 TEXAS & PAC. RY. v. GULF, ETC. (270 U. S. 266), is cited. This case has already been noticed. The certificate in this case will accomplish the "preservation of the earning

capacity" of the Norfolk Company emphasized in that case by preventing the Chesapeake Company from diverting coal tonnages which now move via the Norfolk route.

At p. 59, the same case is quoted as condemning "invasion through new construction of territory adequately served by another carrier". The territory traversed by the new line of the Virginian and the line of the Norfolk now sought to be enjoined has never been served by any railroad.

At p. 62 is a quotation from a statement of Mr. Edgar E. Clark, of the Interstate Commerce Commission, addressed to a Committee of Congress in the context of the consideration of a Bill now incorporated as Paragraphs (18) and (20) of Section 1 of the Interstate Commerce Act. Mr. Clark explained that the proposed law would prevent the building of *duplicate* lines of railroad not needed which would "simply depend for traffic upon that which they can get away from railroads already built," thus adding to the burdens of the public for maintenance.

The Gilbert-Wharncliffe line is not a duplicate of any existing line but traverses a territory which has heretofore been without railroad service. There is no evidence that the new line will take a ton of freight or a single passenger

from any other existing line. Its principal use will be in hauling newly developed traffic or more advantageously transporting existing traffic now moving over other lines of the Norfolk Company.

The Chesapeake Company plans to be the sole connection of the Virginian west from Gilbert for traffic "which they can get away from railroads already built"—that is, from the Norfolk Company.

The UTAH TERMINAL CASE (72 I. C. C. 89), is quoted (p. 65), as negativing "any presumption that it was the purpose of Congress to permit the construction of new and competitive lines of railroad where existing facilities are adequate or can be made so by the exercise of available administrative remedies."

The facilities must be "existing" and "adequate." No railroad facilities were in existence in the Guyandot Valley between Gilbert and Itmann. The Line authorized in that Valley for construction by the Virginian Company will be the only Line there. That Line is not competitive with the Chesapeake Company or any other railroad in that area.

The Wharncliffe Line will not be a competing Line with the Chesapeake Line for a pound of traffic or a passenger now moving over the Chesa-

peake Line west from or east to Gilbert. *The Chesapeake Line was a dead end and would have continued so but for the certificate of the Commission issued to the Virginian Company.*

It would indeed have been a strange distortion of the phrase of the statute "public convenience and necessity" for railroad service if the Chesapeake Company had persuaded the Commission to deny in part adequate service in an area theretofore without any railroad service; and to refuse authority to the Norfolk Company to construct a line needed to maintain and transport its existing traffic more economically and advantageously; to enable the Virginian to make adequate use of its Guyandot Line; to serve shippers from joint mines; and to serve the coal development of the future in the area traversed by the Gilbert-Wharncliffe line.

(2) *The Wharncliffe Line is required for the development in the future of coal-bearing lands tributary to that line on Gilbert and Horsepen Creeks.*

The opinion of the District Court gives this resumé of this phase of the evidence and the Court's conclusion thereon (35 Fed. (2d) 775):

> "There is substantial evidence that in this 10½ miles from Gilbert to Wharncliffe there is a large tonnage of mineable coal which

witnesses estimated to be from 120,000,000 to 175,000,000 tons, and there is evidence of witnesses to show that this can best be developed by the Gilbert-Wharncliffe line or by a short branch extending from that line up Horsepen Creek. The I. C. C. found this to be true and we cannot substitute our judgment thereon, even if there were substantial evidence to the contrary. This will, of course, be a matter of future development, but the law authorizes the issuance of a certificate upon a finding by the I. C. C. that the present or future public convenience and necessity require or will require such construction."

The evidence supporting this finding is as follows: Witness Dunglinson (R. p. 226) estimated the mineable coal in the area between Gilbert and Wharncliffe at 120,000,000 tons of high volatile coal; Witness Walker (R. p. 229) estimated that there are tributary to Gilbert Creek (along which the Gilbert-Wharncliffe line extends for part of its length) 31 square miles of coal bearing land, containing 175,000,000 tons of gas coal. Witness Crawford (R. p. 217) describing the branches necessary fully to develop the resources of the territory in question, referred to the proposed Horsepen branch, about five miles in length, connecting between Gilbert and Wharncliffe, and estimated its cost as $600,000.

Our opponents (Appellant's Brief, pp. 20-21) try to balance the evidence for public convenience and necessity and disagree with the administrative conclusion announced by the Commission. One aspect of this part of the argument is interesting for particular notice in the context of service for the Horsepen Creek area. The assertion is made (Brief, p. 20) "that Gilbert and Horsepen Creeks lie in the Guyandot Valley, are tributary to the Guyandot River, and are readily accessible to development by either the Virginian's new line or appellant's Logan Subdivision, each of which follows the course of the Guyandot River and connects with the other at Gilbert." Neither the Virginian Company nor the Chesapeake Company proposed to build a line into that territory.

This is almost equivalent to a claim of the Chesapeake Company of exclusive dominion to determine when and how the mineable coal in the Gilbert Creek and Horsepen Creek areas shall receive railroad service, and to furnish that service at its pleasure in the future.

(3) *The Wharncliffe Line is required to enable the Virginian Company to attain the expected profitable use of its own Line in the Guyandot Valley.*

The Virginian Company, after filing its separate application to build the line in the Guyandot

Valley between Itmann and Gilbert, supported the Norfolk Company's application for authority for the Wharncliffe Line. In the Virginian's Reply Brief filed with the Commission on August 25, 1928, the evidence on this phase was thus marshalled:—

> "The Virginian 'has consistently favored this part of the Norfolk's application, because its large westbound tonnage from the 29 joint mines to which the C. & O. refuses westbound routes and rates must continue to move via the N. & W. route, in all probability the same conditions which now constrain enough tonnage from other mines to move by that route to make an aggregate of 80% of the Virginian's total westbound tonnage will continue to compel a large amount of tonnage from such other mines to so move, and such tonnage presently moves disadvantageously over both Virginian and N. & W. lines via Matoaka as compared with movement over the Itmann-Gilbert-Wharncliffe route.
>
> "If the economies resulting from the movement over the last named route are not equal to the 14 cents estimated by a N. & W. witness or the 12 cents estimated by C. & O. and Virginian witnesses, they will at any rate be considerable, perhaps near the latter figure. And the N. & W. and the Virginian, which must continue to move jointly a large

tonnage to the west, are entitled to realize these economies." Pages 21-22 of the Reply Brief.

The Reply Brief continues:—

"Without the Gilbert-Wharncliffe line of the N. & W., the new line" (of the Virginian) "will not have its fullest and most advantageous use, nor will the Virginian line between Elmore and Matoaka be cleared for the movement of eastbound coal from the new line nor able to defer so long the additions and betterments thereon, which increasing business will eventually demand. Not only will the Virginian be compelled to haul to Matoaka the westbound coal originating on its present lines and routed via the N. & W. but it must back haul to Elmore and Matoaka all westbound coal originating on the new line and routed by the N. & W., of which there will necessarily be some since the Virginian cannot refuse to shippers on the new line the same routes to the west as are open to others." Pages 22-23 of the Reply Brief.

(4) *The evidence establishes that the Wharncliffe Line is necessary to accomplish economies in operating costs in connection with traffic now moving by way of other lines of the Norfolk Company.*

The opinion of the District Court on this phase of the evidence is as follows (35 Fed. (2d) 775):

"It must be remembered that the greater part of the traffic which is expected to move over the line which the Virginian has been authorized to construct from Itmann to Gilbert will be coal originating on existing lines of the Virginian Railway and destined to be hauled west, and which is now moving over other routes at the rate of about 4,000,000 tons a year and is expected to increase in volume. That coal orginates at mines on existing lines of the Virginian which are either local to its rails or served jointly by the Virginian and C. & O. From the local mines, and from the joint mines which are directly intermediate, there are joint rates by way of the rails of the Virginian in connection with both the C. & O. and N. & W. through Deepwater and Matoaka respectively. From 27 other joint mines there are likewise joint rates in connection with the N. & W. by way of Matoaka, but the C. & O. has refused to join with the Virginian in establishing joint rates by way of Deepwater, because it has its own rails all the way from those mines to the western markets."

"The coal shippers from this region, for reasons of their own, have heretofore caused about eighty per cent. of all westbound coal originating on the Virginian to be moved by way of Matoaka and the N. & W., and the I. C. C., in giving its approval to the Gilbert-Wharncliffe line, has declined to deprive these shippers of the continued opportunity

to use the N. & W. lines. If the Gilbert-Wharncliffe line is not built, then the existing routes by way of Matoaka must be continued. To the extent that the shippers continue to use the Matoaka route, the use of the Itmann-Gilbert line of the Virginian will be curtailed and the participating carriers will be unable to accomplish the operating economies which would result from the use of that route."

The Commission in its report stated (R. p. 37) that "the main functions of all of the proposed lines are the same, viz: (*a*) to provide a suitable outlet for westbound traffic, chiefly coal, from the lines of the Virginian and C. & O. in the upper Guyandot basin; and (*b*) to carry the traffic to be developed by the proposed construction."* It also referred (R. pp. 44-5) to the estimates of traffic expected to move over the proposed lines submitted by the three applicant carriers, including traffic expected to be developed from points on the proposed lines and the traffic from other origins expected to move over those lines. It further stated (R. pp. 54-5) that the principal need for

*References are sometimes made herein to findings of the Commission, instead of to the evidence, because the printed record does not contain all the evidence before the Commission and the appellant, for the purpose of limiting the size of the record, has conceded that it "did not question before the District Court, and does not now question, any statement of fact (as distinguished from conclusions based on those facts) found in the report of the Commission" (R. p. 132).

the proposed line in the Guyandot Valley (apart from local service) is to provide an economical outlet for westbound coal mined in the upper Guyandot basin and that "more than two-thirds of this coal is originated by the Virginian." Witness Marshall (R. p. 160) testified that during the first nine months of 1927, there were originated on the Virginian and moved to the Wes 3,203,793 tons of coal and (R. pp. 158-9) that 2,741,331 tons of that total (or 85 per cent.) moved via routes in connection with the Norfolk Company through Matoaka, W. Va. The mines at which that coal originated are shown (R. pp. 161-8), and whether those mines are local to the Virginian Company or joint with the Chesapeake Company is shown (R. pp. 141-5). The testimony also discloses the mines from which joint rates are available via the Virginian Company in connection with the Chesapeake Company. Witness Adsit (R. p. 237) testified that the Chesapeake Company refused to permit the establishment of joint rates from certain joint Virginian-Chesapeake mines via routes of the Virginian Company in connection with the Chesapeake Company, and (R. pp. 171-2) 27 of such mines are listed with the coal moved from each via the Virginian Company through Matoaka, aggregating 1,244,915 tons during the

first nine months of 1927. Witness Hull of the Chesapeake Company (R. p. 140) stated that the Matoaka route in connection with the Norfolk Company "already exists, and will continue" to exist if the Norfolk Company's construction from Gilbert to Wharncliffe is not permitted. Witness Crawford (R. pp. 213-4) estimated that the movement of that coal via the Gilbert-Wharncliffe route would result in a saving of approximately 14 cents per ton in operating expenses.

Unless the Gilbert-Wharncliffe line is built the Matoaka route will be continued and will be the only available route from Virginian origins in connection with the Norfolk Company. The shippers of coal having shown a preference for a route via the Norfolk Company by sending over 80 per cent. of their westbound coal shipments via Norfolk routes, may reasonably be expected to utilize a Norfolk Company route for some substantial volume of traffic in the future. From 27 of the joint mines the only available joint rates for traffic originated by the Virginian are in connection with the Norfolk Company, the Chesapeake Company having refused to establish joint rates. The construction of the new line of the Virginian will not change that condition. Joint rates over that line would short-haul the Chesapeake. And that road could not be compelled to

do so under the provisions of Paragraph (4), Section 15, of the Interstate Commerce Act. Therefore, if the construction of the Gilbert-Wharncliffe line is prevented, the Matoaka route will be the only available route for the movement on joint rates of coal originated by the Virginian at those 27 mines, and would have to be used. The evidence shows that the Norfolk Company could and would, if the Gilbert-Wharncliffe line is constructed, substitute a route via that line, and that such a route would be more economical by 14 cents per ton than the existing Matoaka route.

The Chesapeake Company answers that "There is, however, no proof that appellant would avail itself of the short-haul provision of the Act and decline to open the new route to these mines." The evidence does show that it has refused to allow itself to be short-hauled by establishing joint rates via existing lines; that it would be short-hauled to the same extent via the new line; and it has never indicated a willingness to establish joint rates from those 27 mines even after the new line is completed. Surely the Commission was right in disposing of the subject of public convenience and necessity in the status as presented without leaving the 27 mine owners to the tender mercies of carrier charity opposed, in this instance, to that carrier's interest.

The Chesapeake Company also asserts (Brief, p. 35): That there is no necessity for the movement of coal from those mines via any route in connection with the Norfolk Company, via either Matoaka or Wharncliffe, because the Chesapeake has a single line route all the way from the mines to the west. But this is beside the question. Here there are two carriers serving each of those 27 mines with their own rails, the Virginian and the Chesapeake. The shipper may deliver his traffic to either for transportation. The Virginian would not retire from the handling of traffic originating at mines on its own rails (even if it could be permitted to do so) merely because the Chesapeake has a single line route of its own. If the shipper delivers the traffic to the Virginian for transportation, the single line route of the Chesapeake is not available, no other route of the Chesapeake is available because of its refusal to be short-hauled, and the only available route under joint rates is that of the Virginian in connection with the Norfolk Company.

Unless the Norfolk Company is permitted to provide a route via Gilbert and Wharncliffe, the Matoaka route must be used, and it would be prevented from accomplishing large economies in operating expenses.

(5) *The Wharncliffe Line is necessary to enable the Norfolk Company to participate in the coal, lumber and other traffic originating along or destined to points on the Virginian's new lines in the Guyandot Valley.*

An important use, already considered, of the Virginian's new line in the Guyandot Valley, is for the more economical transportation of coal originating on existing lines of the Virginian in the upper Guyandot Basin and now moving to the west via existing routes. Another use for that line is for the development and movement of the resources of the tributary territory, of which coal is the most important, and lumber second in importance.

Witnesses for each of the three carriers testified to the resources of that territory tributary to a line between Gilbert and Itmann, and the traffic expected. For the Norfolk Company, Witness Dunglinson (R. pp. 224-6) testified that there are approximately 390 square miles of tributary territory, all underlaid with coal, and estimated that the minable coal in that area amounts to 470,000,000 tons of high volatile coal and 410,000,000 tons of low volatile coal. Other witnesses estimated the timber resources of that territory (R. p. 35).

Mr. Dunglinson also estimated that the ex-

The Appellant does not challenge these facts but rather confesses and seeks to avoid them, thus:—

A. The Wharncliffe line will continue the Norfolk Company an active competitor of the Chesapeake, although that competition, the Chesapeake Company asserts, has not been shown to be required by the public convenience and necessity.

The Congress has, in Paragraph (4) of Section 5 of the Interstate Commerce Act, declared its policy to preserve competition as fully as possible. The construction of the Gilbert-Wharncliffe line will preserve existing carrier competition.

B. The Chesapeake Company relies upon the theory, exploded by the evidence (*supra*), that the Wharncliffe line is "poor," "wasteful" and like adjectives.

C. The Appellant contends that promotion of competition is not, in law, a sufficient consideration for granting a certificate for the construction of a new line; and asserts that the promotion of competition was the sole ground upon which the Commission awarded the certificate. This is urged by Appellant as an erroneous conception and theory of the law.

The creation of new competition may, in a

particular case, be a matter of public interest sufficient alone to warrant a certificate. The preservation of existing competition in accord with the declared purpose of Congress alone may justify the Commission in awarding a certificate for the construction of a new line.

In PENNSYLVANIA R. CO. v. UNITED STATES, 40 Fed. (2d) 921, (decided May 24, 1930) the District Court said:—

> "True, the complainant now is and for a long time has been exclusively serving Donora and is now receiving the profits from handling all the traffic flowing into and out of that busy district. But that is a privilege rather than a right—a privilege to be enjoyed so long as it shall last, not a right to be asserted, unless it be found somewhere in the law, written or unwritten. Certainly there is no unwritten law that gives a carrier, first to serve a community, the right to hold its traffic against all competitors. It is equally certain that the written law—the Transportation Act of 1920—does not explicitly or implicitly accord a non-competitive traffic area to the first taker as the law accords a trade-mark to the first adopter. Instead of doing this the written law negatives such a right by providing expressly for the invasion by one carrier into a territory exclusively served by another on a showing

pectable coal traffic to be originated along the new line by the end of five years after the line is completed will amount to 1,500,000 tons of low volatile, and 500,000 tons of high volatile coal per annum (R. p. 225). The various estimates of coal traffic and other freight from and to points on the new line are summarized by the Commission in its report (R. p. 44).

The record shows that for years, (since 1901), the Norfolk Company has contemplated developing, at the proper time, the resources of the Guyandot Valley, by the construction through a subsidiary of a line of railroad in that valley (R. p. 205-7). It purchased, in 1901, the stock of the Pocahontas Coal & Coke Company, which has large holdings of coal lands in the Pocahontas field (R. p. 206), including 119,500 acres (or about 40.6 per cent. of its total acreage) in the Guyandot River watershed, 82,500 acres being in the territory tributary to the Itmann-Gilbert line now under construction by the Virginian (R. p. 224). Of the 78,500 acres of land containing low volatile coal in that territory (there is a better market for low volatile coal and these deposits will probably be developed quickest), 52,500 acres, or 67 per cent., are owned by the Pocahontas Company (R. p. 224). The declared purpose of that purchase was to make the Norfolk Company "secure in its coal and

coke traffic which already forms so large a portion of the Company's business" (R. p. 207). As a part of its plans, the Guyandot & Tug River Railroad Company was chartered in 1903, to build a line of railroad in the Guyandot Valley and over to Wharncliffe (R. p. 206). That company acquired and for years has owned nearly all of the land necessary for its right of way between Elmore and Gilbert (R. p. 211), and had spent to the date of the hearing approximately $263,000 in acquiring that right of way, for engineering, and so forth: (R. p. 211), in addition to the investment by the Norfolk Company in acquiring the Pocahontas Coal & Coke Company.

The Commission made an administrative finding that the Norfolk Company should be permitted to compete for the traffic to be originated in that territory on an equal footing with the Chesapeake, and that the Norfolk Company should not be entirely excluded from participation in that traffic. The Norfolk Company can participate only in the event the Gilbert-Wharncliffe line is built. The coal in the Guyandot Valley and in the Horsepen area is so far to the northwest that a route through Matoaka would involve a back-haul and impracticable operating conditions.

That the Commission had these facts in mind in authorizing the construction of the Gilbert-Wharncliffe line seems clear from the detailed recital in its report (R. pp. 51-2) of the facts of the organization, acquisition, history, etc., of the Pocahontas Coal & Coke Company and the Guyandot & Tug River Railroad Company, and its specific finding that

> "The construction of that part of the N. & W.'s proposed line from Wharncliffe to Gilbert would enable the N. & W. to compete with the C. & O. for westbound traffic from the Guyandot Valley, and would assure operators in the territory competitive service to the west. The N. & W. might be disposed to permit the exploitation of the lands of the Pocahontas Company, provided it received the westbound tonnage therefrom at Wharncliffe." (R. p. 57.)

The District Court, after quoting that language, makes this comment upon that phase of the justification of the Gilbert-Wharncliffe line (R. pp. 94-5):—

> "As heretofore set out, the N. & W. is the owner of a very great acreage of land in the Guyandot Valley and has been such owner for at least 28 years, and had contemplated developing the same whenever the necessity therefor should appear, and has

spent a large sum of money in maintaining rights of way and in engineering and other matters necessary for the proposed construction of a railroad in the Guyandot Valley, and the declared purpose of the purchase of this large quantity of land was to make the N. & W. 'secure in its coal and coke traffic which already forms so large a portion of the company's business.' If the N. & W. refused to permit the development of its lands in this valley unless all the products thereof that go west were returned east to its branch line at Matoaka and then hauled west over its main line, it would seriously interfere with the expected business of the Virginian Railway and would be an uneconomical way of taking these products to market. The I. C. C. evidently reached the conclusion that, by the burden of the ownership of this large body of land for this great length of time, certain rights accrued to the N. & W., and in our opinion equity, at least, requires agreement with such conclusion (R. p. 57).

"The desirability of competitive service for the purpose of hauling the products of this Guyandot Valley to market certainly seems to have been considered by the I. C. C. in awarding the certificate for the construction of the Gilbert-Wharncliffe Line, and it seems to us that the fact that it was so considered is clear from its report."

(6) *The Wharncliffe Line is necessary to prevent the bottling up of the Virginian by having only one active Western outlet at Gilbert.*

The District Court said (pages 776-777):—

"As heretofore shown, The Virginian is a trunk line railroad extending from Hampton Roads, Va., to and ending into the coal fields of Southern West Virginia. The I. C. C., in the case of Control of Virginian Railway, 117 I. C. C. 67, refused to approve the proposed lease of its properties to the N. & W. We think that the right construction of this act of the I. C. C. is to believe that the Virginian should be preserved independently of the two other major coal-carrying lines in that vicinity.

"The I. C. C. also required (VIRGINIAN RAILROAD v. UNITED STATES, *et al.*, 272 U. S. 658, 47 S. Ct. 222, 71 L. Ed. 463) '* * * the establishment of joint rates on coal to the west and the evidence in the case was that that traffic is or will in the future be an important part of the Virginian's total traffic.'

"The I. C. C., by awarding the certificate for the Itmann-Gilbert line to the Virginian, apparently endeavored to give it a more suitable and effective outlet to the west. But it would still be bottled up if the only connection at Gilbert was with the C. & O., and the authorization of the Gilbert-Wharn-

cliffe line seems to have been a means, in the minds of the members of the commission, to prevent such condition. The I. C. C. evidently considered the Gilbert-Wharncliffe certificate as a corollary to the certificate awarded the Virginian, and its construction is a necessary part of the very theory and object of the I. C. C. in the development of the Virginian as an independent trunk-line carrier (R. pp. 56-7).

"In the report in this case the I. C. C. lays real stress on the fact that the coal reserves of the C. & O. and N. & W. are much greater than those of the Virginian, and also lays stress on the fact that the coal reserves of the C. & O. are likewise much larger than those of the N. & W.

"From the Ohio river, at Kenova and Huntington respectively, run the lines of the N. & W. and C. & O. southeast along the valley of the Big Sandy river and the Guyandot river. The N. & W. leaves the state near Bluefield (about 180 miles from Kenova), and the C. & O. stops at Gilbert, more than 90 miles from its main line, and there is no cross railway between them for those long distances. The same condition will prevail when the Virginian is finished from Itmann to Gilbert on its line of more than 40 miles. We are of opinion that it is to the interest of the Public within that long distance to have a cross line for the purpose of carrying freight and passengers

of local people from one railway to the other without the necessity of making these long hauls to the Ohio river on one railway and then back up the other when the distance between these railways in these two valleys is so short."

The location of the lines of the three carriers is described by the Commission (R. pp. 33-4).

The Commission stated that "The Virginian needs its proposed line in order to have greater independence in the matter of an outlet for westbound coal. It appears that it can have no suitable outlet to the west except down the Guyandot River and it is not desirable to put the ownership of the line through this narrow-mountain valley or gorge under the control of one of its competitors" (R. p. 56).

The Commission also stated (R. p. 57) that the certificate to the Norfolk Company for the Wharncliffe Line "would enable the N. & W. to compete with the C. & O. for westbound traffic from the Guyandot Valley, and would assure operators in the territory competitive service to the west" (R. p. 57).

Appellant's Brief (pp. 25-6—sub-division 2 (*e*)) treats as a "finding" of the Court the statement (R. p. 96) of opinion "that it is to the interest of the public within that long distance" (about

150 miles) "to have a cross-line for the purpose of carrying freight and passengers of local people from one railway to the other without the necessity of making these long hauls to the Ohio River on one railway and then back up the other when the distance between these railways in these two valleys is so short."

This has reference to the Wharncliffe Line as a cross-line connecting the Virginian and Chesapeake in the Guyandot Valley with the Norfolk in the Tug Valley. The Appellant's Brief (pp. 25-6) makes complaint:—

> "(1) that the Commission found shipments of coal to local points east of Kenova to be negligible (R. 38-9), (2) that the record fails to disclose the existence of any movement of either passengers or merchandise from one valley to the Ohio and thence back to the other valley and (3) that there is no evidence whatever of any need or even request, for interchange between the valleys by rail of either passengers or freight of any character whatever."

As to (1), existing shipments of coal to local points east of Kenova on the Norfolk Line cannot measure the usefulness of a cross-line not now in existence. As to (2), the problem isn't the volume of the traffic now moving via the junction on the Ohio River but is rather a question of

furnishing a cross-line that will be a convenience and encourage that traffic in the future; and there is evidence with regard to the prospective movement of general merchandise traffic over the route of the new line to destinations in the Guyandot Valley and to points on existing lines of the Virginian in the coal fields (R. pp. 215-6). The possibility of using the proposed line for the development of business from one valley to another is referred to (R. p. 216) specifically as to jobbing from Williamson, W. Va. As to (3), the geographical conditions justify the Court's observation that the cross-line may be a public convenience and necessity in the future.

II.

The Chesapeake Company Has No Legal Right Affected By the Certificate and Order of the Commission Sought to be Enjoined.

As Point 5 in the Summary of Argument (p. 46 of Appellant's Brief) and Point 3 of the Argument (p. 65 of Appellant's Brief) the Appellant argues that it "has such an interest in the consequences of the action of the Commission in authorizing the Gilbert-Wharncliffe line as to subject it to irreparable injury of a character which the Courts should prevent."

The Appellant's Brief (pp. 67-68) cites in this context three decisions of this Court.

The first case is PIEDMONT & NOR. RY. v. UNITED STATES, 280 U. S. 469. In that case the Piedmont & Northern Railway had applied to the Commission for a certificate under Paragraph (18) of Section 1. The Commission by order denied the application. Thereupon the Piedmont & Northern sought to have the Commission's order set aside on the ground that the subject matter was beyond the Commission's jurisdiction. The Court observed that if the order was beyond the Commission's jurisdiction, as contended "then obviously the order is no obstacle to the railway's plans" and that "what plaintiffs are seeking is, therefore, in substance, a declaratory judgment," and refused the relief prayed.

The second case relied upon by appellant is the CHICAGO JUNCTION CASE, 264 U. S. 258. That case arose from an application under Paragraph (2) of Section 5 of the Interstate Commerce Act governing control of one carrier by another and authorizing the Commission to approve if control "will be in the public interest." The present proceeding is referable to a different statute, Paragraph (18) of Section 1. At page 262 this Court stated that the order in the CHICAGO JUNCTION CASE "was entered solely under para-

graph 2 of section 5" and added "We have, therefore, no occasion to consider the incidents of applications under paragraph 18 of section 1, or rights thereunder."

Moreover, the Court observed that the arrangement authorized by the Commission and sought to be enjoined had for its main purpose the acquisition by the New York Central Railroad of a larger share of the Chicago business, a plan by that railroad "to obtain traffic theretofore enjoyed by its competitors" who sought to enjoin the order. The decision seems an unhappy one for the Appellant.

The third case cited is TEXAS & PAC. RY. COMPANY V. GULF, ETC., RY., 270 U. S. 266. In that case the construction of an extension was attempted by the carrier without securing a certificate of the Interstate Commerce Commission: p. 271. An injunction was granted to the Texas & Pacific Railway Company as required by Paragraph (20) of Section 1, which provides that any construction contrary to the provisions of Paragraphs (18), (19) and (20) of Section 1 may be enjoined at the suit of any "party in interest." In the case at Bar a certificate was applied for, and after hearing was issued, and the special statutory remedy under Paragraph (20) affords no analogy.

This case also may be differentiated from the case at bar because there the plaintiff, Texas & Pacific Railway, already served with its rails the district sought to be reached by the line in controversy, and the Court found that the proposed line would divert from it traffic estimated at more than $500,000 a year. In the present case the Wharncliffe Line will not take from the Chesapeake Company a single ton of freight or one passenger which it has heretofore enjoyed.

In the case at bar, the Chesapeake Company, in Finance Docket No. 4818, applied to the Commission under Paragraph (18) of Section 1 of the Interstate Commerce Act for a certificate of public convenience and necessity. That application was denied. The Commission authorized the Virginian Company to construct a new line from Gilbert to Itmann, occupying the very territory into which the Chesapeake Company sought to extend its lines. The Chesapeake Company has acquiesced in the certificate issued to the Virginian Company; and it is thus adjudicated that the Chesapeake Company has been excluded from the Guyandot Valley above Gilbert.

The Norfolk Company is the only carrier which has ever proposed a line from Gilbert to Wharncliffe. The Chesapeake Company is in the posi-

tion of seeking to prevent construction of a new line of railroad by the Norfolk Company through a territory not now traversed by any railroad, without itself proposing to provide transportation facilities there.

There is no proof in the record that the construction of the Gilbert-Wharncliffe line will take from the Chesapeake Company any traffic now originating on or moving over its line. The Chesapeake Company will be benefitted by the construction authorized by the Commission. Instead of being a dead-end branch ending at Gilbert, its Logan sub-division will connect at that point with the new lines of the Virginian and the Norfolk Companies. Instead of being deprived of traffic now moving over its rails, the Chesapeake Company may reasonably expect to secure in interchange at Gilbert some of the coal traffic originating on the new line or the old lines of the Virginian Company.

Even with the construction of the line now sought to be enjoined the Chesapeake Company expects to receive at Gilbert half of the available traffic, and its estimate of irreparable injury is based upon the theory that it would not be able also to divert to its lines the other half of the available traffic! (R. p. 245). Appellant's claim of legal injury rests upon the proposition that,

even though the Commission's certificate and order will improve its condition, the benefits would be still greater if one part of the order is permitted to stand and another part is enjoined, so that appellant would in the future be able to take from its competitor traffic which in the past has moved over the competitor's lines, and exclude that competitor from participation in new traffic.

The case of PENNSYLVANIA R. Co. v. UNITED STATES, decided May 24, 1930, 40 Fed. (2d) 921, was a bill praying an injunction against an order of the Commission which had authorized the Pittsburgh & West Virginia Railway Company to construct a branch six miles in length from its Connellsville Extension into Donora and to an important plant there already exclusively served by The Pennsylvania Railroad Company. This branch would necessarily, to the extent that it secured traffic from the industry, have reduced the Pennsylvania's existing business. The District Court observed that the Pennsylvania was entitled to intervene and be heard before the Commission as it had done. But the Court denied the injunction and dismissed the bill, saying on this point:—

> "True, the complainant now is and for a long time has been exclusively serving Donora and is now receiving the profits from hand-

ling all the traffic flowing into and out of that busy district. But that is a privilege rather than a right—a privilege to be enjoyed so long as it shall last, not a right to be asserted, unless it be found somewhere in the law, written or unwritten. Certainly there is no unwritten law that gives a carrier, first to serve a community, the right to hold its traffic against all competitors. It is equally certain that the written law—the Transportation Act of 1920—does not explicitly or implicitly accord a non-competitive traffic area to the first taker as the law accords a trade-mark to the first adopter. Instead of doing this the written law negatives such a right by providing expressly for the invasion by one carrier into a territory exclusively served by another on a showing of convenience and necessity of more transportation service for those inside reaching out and those outside reaching in. Where, as here, the showing is lawfully made and the Commission has validly acted, the carrier at whose expense the change is wrought has had no legal right invaded and has suffered no legal injury. In consequence it has nothing on which to sustain an independent suit to vacate and set aside such an order of the Interstate Commerce Commission."

That was a closer case than the present one because existing traffic of the complaining carrier would be switched to the newly constructed

line. The newly constructed railroad would invade territory theretofore served by another and take traffic which that other railroad already enjoyed. Here that will not happen.

In the case of SPRUNT & SON v. UNITED STATES, 281 U. S. 249, the appellants were shippers who had enjoyed certain rate advantages over their competitors. The Commission found that those advantages created undue preference and prejudice, and ordered them discontinued. The interested carriers acquiesced in the finding and order, but the shippers who had previously enjoyed those advantages brought suits to enjoin and set aside the Commission's order. On appeal this Court said:—

> "The appellants contend that there is no basis for the Commission's finding of undue prejudice and preference. We are of opinion that appellants have no standing in their own right, to make this attack. In so far as the order directs elimination of the rate differential previously existing, it worsened the economic position of the appellants. It deprived them of an advantage over other competitors of almost 3.5 cents per hundred pounds. The enjoyment of this advantage gave them a distinct interest in the proceeding before the Commission under §3 of the Interstate Commerce Act." (49 U. S. C. A. Sec. 3). "For their competitive advantage was threatened. Having this in-

terest, they were entitled to intervene in that administrative proceeding, and, if they did so, they became entitled under §212 of the Judicial Code" (28 U. S. C. A. Sec. 45a) "to intervene, as of right, in any suit 'where is involved the validity' of the order entered by the Commission. But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order."

This point is jurisdictional of the parties and may be made at any stage of the case. The decree of the District Court, refusing the injunction and dismissing the bill, should be affirmed without regard to the other questions.

III.

(Assignment of Error VIII; R. p. 255 referring (by mistake) to Assignment VII).

The Certificate of 23 July, 1928, in one order disposed of the whole subject of the public convenience and necessity in the matter of new construction of railroad in the entire area. The inter-related problems determined in the report and by the order cannot be severed for piece-meal litigation. No Error.

(See (3) pp. 26-27, Appellant's Brief.)

This point was argued on Brief and orally in the District Court and will be argued here by

Counsel for the United States and the Interstate Commerce Commission. We leave the point to them with brief suggestion of some developments in the case before the Commission that bear upon the unity of the order as a railroad problem.

The unity of an order granting a construction certificate can hardly be tested by considering whether the Virginian Company or the Norfolk Company could respectively have declined to build each its portion of the through Line from Itmann via Gilbert to Wharncliffe. Such orders are necessarily permissive, not compulsory. Paragraph (18) wouldn't authorize the Commission to enter a compulsory order. If the Virginian, for instance, had built only from Itmann to Pineville, about half the Line authorized, and had failed to connect with the Norfolk and the Chesapeake Companies at Gilbert there would have been no penalty incurred by the Virginian.

In the beginning the Norfolk and Virginian Companies made application to the Commission jointly as one Line and this (F. D. No. 5161) is the application which the Commission granted to the Norfolk Company for the Wharncliffe Line (R. p. 240).

The problem of railroad service for the public convenience and necessity remained one and indivisible from Itmann to Wharncliffe, a distance

of some 53 miles of mountain country then without railroad service.

The Commission in one report and order authorized the construction by the Virginian Company of the line between Itmann and Gilbert, by the Norfolk Company of the line between Gilbert and Wharncliffe, and denied the Chesapeake Company's application. The lines authorized were to solve the problems presented to the Commission, *i. e.*, how best to provide new transportation facilities for the development of and railroad service in territory not heretofore served by any railroad and to provide more advantageous routes for the movement of existing traffic. The two lines are to be built by different companies and are inter-related and designed to accomplish those purposes. Neither can be fully effective without the construction of the other. The Virginian Company supported before the Commission the Norfolk's application for the construction of the line now sought to be enjoined because "without the Gilbert-Wharncliffe line of the Norfolk and Western, the new line" (of the Virginian) "will not have its fullest and most advantageous use." The order may not be set aside in part, for this would substitute some different plan for that which the Commission,

in the exercise of its administrative discretion, has decided will be required for the present and future public convenience and necessity.

The decree should be affirmed.

Respectfully submitted:

JOHN H. HOLT,
ROBERT E. McCABE,
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THEODORE W. REATH,
Attorneys for Guyandot and Tug River Railroad Company and Norfolk and Western Railway Company, Defendants-Appellees.

DECEMBER, 1930.

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In the Supreme Court of the United States.

No. 73 of October Term, 1930.

Chesapeake and Ohio Railway Company,
Plaintiff-Appellant,

v.

United States of America, Guyandot and Tug River Railroad Company, and Norfolk and Western Railway Company,
Defendants-Appellees.

RAILWAY CONSTRUCTION SINCE CASE WAS HEARD IN THE DISTRICT COURT.

A change in the status has occurred since the case was presented in the District Court. No

supersedeas was obtained. The Order of the Commission has been in effect since November 1, 1928. The Norfolk Company acted upon the faith of the Order and could not have done otherwise if its rights thereunder were to be preserved.

Has the case become moot or inappropriate by the changed conditions for the exercise of the equitable power of the District Court? The facts which we are now to present are stated as bearing upon these problems.

This case was heard, argued and submitted in the District Court January 2, 1929, and submitted to that Court by agreement of all the parties by Counsel "for its decision as on final hearing": R. p. 80. The prayer of the petition of the Chesapeake Company for a preliminary injunction was thus abandoned, and no interlocutory order and injunction *pendente lite* or *supersedeas* was allowed.

The petition of the Chesapeake Company was filed in the District Court December 8, 1928: R. p. 1.

The order of the Commission granting a certificate to the Virginian Company for the Line in the Guyandot Valley and to the Norfolk Company for the connecting Line from Gilbert to Wharncliffe was dated July 23, 1928: R. p. 239; on petition of the Chesapeake Company the effec-

tive date was postponed for 30 days by an order entered August 20, 1928, and further postponed to October 22, 1928, by an order entered September 5, 1928: R. pp. 241-242.

The petition of the Chesapeake Company for reconsideration and reargument was denied by order dated 1 October, 1928: R. pp. 242-3; and by an order dated 20 October, 1928, a further petition of the Chesapeake Company for reconsideration and reargument as to the certificate for the Gilbert-Wharncliffe Line was postponed in effective date to November 22, 1928: R. p. 243.

The final order of the Commission, dated 1 November, 1928, denied the further petition of the Chesapeake Company and directed that the order of July 23, 1928, should "take effect and be in force from and after" November 1, 1928: R. p. 244.

The order of the Commission, dated July 23, 1928, granted a certificate to the Virginian Company for the Line in the Guyandot Valley and to the Guyandot Company, a subsidiary of the Norfolk Company, for the Line from Gilbert to Wharncliffe. These certificates were granted in the same order of the Commission and both were conditioned that "said line of railroad shall be commenced on or before January 1, 1929, and be completed on or before December 31, 1931."

In order to avail themselves of the authority granted by the Commission's order of July 23, 1928, the Virginian and Norfolk Companies were required to commence construction on or before January 1, 1929. Construction was accordingly commenced by both Companies prior to January 1, 1929, and has been prosecuted since then so that the whole railroad project will be completed and ready for operation by the time limit allowed both Companies—namely, on or before December 31, 1931.

The Line authorized for construction by the Virginian Company was some 43 miles in length from Itmann to Gilbert: and the connecting Line authorized for construction by the Norfolk Company was 10.5 miles in length from a connection with the northwest end of the Virginian at Gilbert to the main line of the Norfolk Company at Wharncliffe.

The Virginian construction was prosecuted from the northwest end of its Railroad at Itmann down the Guyandot Valley toward Gilbert: and the Norfolk Company's construction, which included a 4400 foot tunnel, was prosecuted from both ends.

The Virginian Company has expended to October 20, 1930, the sum of $2,300,000. The grading and bridge work have been completed from Itmann for a distance of 24 miles, and

rails have been laid for a distance of 20 miles. From the end of the grading to Gilbert, a distance of 19 miles, the grading was about 20% completed. The construction of the Line was approximately 50% completed.

These data are given as of October 20, 1930, since which date the work has progressed further.

The Norfolk Company has expended to October 20, 1930, the sum of $1,695,000. The grading is 90% completed, the part remaining to be done being practically all located in the vicinity of Gilbert. The masonry and bridge work have been completed. The heading of the tunnel has been driven and 70% of the tunnel excavation accomplished. The roof of the tunnel has been timbered throughout, and the sides have been timbered as far as the excavation extends. Track has been laid from Wharncliffe, the junction with the Main Line of the Norfolk Company, up to a point within 1800 feet of the tunnel, this being about 4¼ miles of Main Line laid out of a total of 10½ miles. The track work is about 35% completed; and the total work approximately 60% completed.

These data are given as of October 20, 1930, since which date the work has progressed further.

This paper will be filed and copies handed Counsel for the Chesapeake Company, for the

United States, and for the Interstate Commerce Commission in the cause sufficiently in advance of the cause being reached for oral argument to give opportunity for answer.

Respectfully submitted,

JOHN H. HOLT,
ROBERT E. McCABE,
D. LYNCH YOUNGER,
THEODORE W. REATH,

Of Counsel for Guyandot and Tug River Railroad Company and Norfolk and Western Railway Company, Defendants-Appellees.

DECEMBER, 1930.

SUPREME COURT OF THE UNITED STATES.

No. 73.—October Term, 1930.

Chesapeake and Ohio Railway Company, Appellant, *vs.* United States of America, Guyandot and Tug River Railroad Company, Norfolk and Western Railway Company, and Interstate Commerce Commission.	Appeal from the District Court of the United States for the Southern District of West Virginia.

[March 9, 1931.]

Mr. Justice Butler delivered the opinion of the Court.

This suit was brought by the appellant, for brevity called the Chesapeake, under the Urgent Deficiencies Act, 28 U. S. C., § 47, against the United States, the Guyandot and Tug River Railroad Company and the Norfolk and Western Railway Company. The former is a subsidiary of the latter and both may be called the Norfolk. The Interstate Commerce Commission appeared as a defendant. 28 U. S. C., § 45a. The purpose of the suit was to set aside and annul so much of an order and certificate of the Commission entered and issued July 23, 1928 (145 I. C. C. 167, 188, 193) and so much of subsequent orders in the same proceeding as authorize the Norfolk to construct and operate a line of railroad in West Virginia from Gilbert about 10½ miles to Wharncliffe. The case was tried before three judges. A condensed statement of the evidence and exhibits before the Commission was submitted to the court. After hearing argument for the respective parties, the court entered its decree denying plaintiff any relief and dismissing the bill. 35 F. (2d) 769.

May 7, 1925, the Chesapeake filed its application for a certificate that the present and future public convenience and necessity require the construction by it of an extension of its Logan subdivision

from Gilbert easterly 47.3 miles to Mullens and an extension of its Winding Gulf line from Stone Coal westerly 8.2 miles to Mullens. On October 29, 1925, the Guyandot company filed its application for a similar certificate for the construction of a line of railroad extending from a connection with the Virginian Railway at Elmore westerly 53 miles to Wharncliffe. The Norfolk and the Virginian joined in this application. An amended application was filed December 24, 1925, by the Guyandot which was joined in by the Norfolk alone. January 21, 1927, the Virginian and Western Railway, a subsidiary of the Virginian Railway Company—both may be referred to as the Virginian—filed its application for a like certificate for the construction of a line extending from a connection with the Guyandot branch of the Virginian at Ittman down that river 40.6 miles to a connection with the Chesapeake at Gilbert. This application was joined in by the Virginian Railway Company.

The locations of all the proposed lines between Gilbert and Mullens, Elmore or Ittman were in the narrow valley traversed by the Guyandot river. Authority to build the line between Gilbert and Wharncliffe was sought only by the Norfolk. The three applications were considered at the same hearing. The Virginian supported the Norfolk's application for the Gilbert-Wharncliffe connection. The Chesapeake opposed. All the applications were disposed of by the same report and order.

The Commission granted to the Virginian permission to construct its line in the Guyandot valley from Ittman to Gilbert and to the Norfolk leave to build between Gilbert and Wharncliffe. It denied the rest of the application of the Norfolk and that of the Chesapeake *in toto*.

The appellant seeks reversal upon the claim that neither the findings of the Commission nor the evidence affords any support for the order and that the record shows the construction of the proposed line between Gilbert and Wharncliffe to be contrary to the public interest and to have been authorized under an erroneous theory of the applicable law. It says that the only finding of the Commission that supports the order is that the construction of the line will enable the Norfolk to compete with the Chesapeake for westbound traffic moving over the Virginian from the Guyan-

dot valley and will assure the coal operators on the Virginian competitive service to the west. And it maintains that the Commission is not authorized by the Act to grant a certificate of public convenience and necessity for new construction upon a naked finding that competition between carriers and competitive service to shippers will result.

The situation, as disclosed by the report and the undisputed evidence, is as follows:

That part of West Virginia which is south of the Kanawha and New rivers contains vast deposits of coal and has many mines in operation. The Chesapeake, the Norfolk and the Virginian are the only railroads of importance in the district. The eastern terminus of the Chesapeake is at Newport News. It serves mines immediately south of these rivers. It has lines extending to the west where it has connections at Cincinnati, Columbus, Chicago and elsewhere on the Great Lakes. The eastern termini of the other carriers are at Norfolk. The lines of the Norfolk through the coal district are in the valleys of the Tug and Big Sandy considerably to the south of the lines of the Chesapeake and separated from them by a range of mountains extending from near Matoaka 150 miles or more northwesterly where it ends not far from Huntington on the Ohio. The Norfolk's main line crosses that of the Chesapeake at Kenova on the south side of the Ohio some distance below Huntington and extends to the west where it has connections at Cincinnati and Columbus. The Virginian has main and branch lines in the easterly part of these coal fields but it has no line to the west. It connects with the Chesapeake at Deepwater, a station on the Kanawha, and with the Norfolk at Matoaka which is a little over the divide south of the valley of the Guyandot.

These railroads have long been competing carriers of coal from that district. The tonnage controlled by the Virginian is about one-seventh of that of the Norfolk and that of the latter is about 60 per cent. of that of the Chesapeake. In 1927, 47 coal mines were served by the Virginian alone. These are called local mines. And 55 were served by it and also by the Chesapeake. These are called joint mines. Such local and joint mines during the first nine months of that year produced and shipped coal via the Virginian at the rate of more than 12,000,000 tons per annum. And in that

period the Virginian handed over to the Chesapeake at Deepwater and to the Norfolk at Matoaka coal for transportation to the west at the rate of more than 4,270,000 tons per annum, 80 per cent. of which moved via Matoaka.

Some years prior to the Virginian's application to build the proposed line the Commission required it to establish joint rates and through routes to the west via Deepwater, the Chesapeake and its connections, and also via Matoaka, the Norfolk and its connections.* The orders in that case covered only rates from a few specific origins on the Virginian. But the Chesapeake and the Virginian voluntarily established joint rates via Deepwater from all local mines on the Virginian and from such of the joint mines as were located between destinations and a local mine. The Chesapeake refused to establish rates from joint mines which were not intermediate because that would operate to short-haul itself. Similar joint rates were voluntarily established by the Virginian and Norfolk via Matoaka from all local and joint mines served by the Virginian.

The Chesapeake and the Norfolk are active competitors for transportation of coal originating on the Virginian and destined to the west. The line of the Virginian between its principal coal territory and Deepwater crosses three summits with heavy adverse grades against the loaded movement and heavier ones against the return movement. The Virginian's line to Matoaka has heavier adverse grades against the loaded movement than on its line to Deepwater. And on that route difficult grades are encountered on the Norfolk.

The line to be built by the Virginian down the Guyandot will have substantially no grades adverse to western movement. The Logan subdivision of the Chesapeake is a well-located low grade line along the lower stretches of that river, and it has capacity to handle efficiently all the west-bound traffic originating on the Virginian. The route to the west down the river to Gilbert and over the divide to Wharncliffe is 41 miles shorter than the route via Matoaka. The line to be built across the divide will have an ad-

*Wyoming Coal Co. *v.* Virginian Ry. Co., 96 I. C. C. 359. 98 I. C. C. 486. Virginian Railway *v.* United States, 272 U. S. 658.

verse grade that will require doubling. But both of the proposed new routes will be better than either of the existing ones. The Chesapeake estimates that the cost per ton of handling coal over the new route via Gilbert and its Logan subdivision will be 1.69 cents per ton less than the cost via the Gilbert-Wharncliffe route. The Norfolk estimates that cost via the latter will be 14 cents per ton less than via the present Matoaka route. The Norfolk through a subsidiary controls large deposits of coal in the valley tributary to the new line of the Virginian. And there is a considerable deposit of coal that may be made tributary to the proposed Gilbert-Wharncliffe line.

There is need for a line to connect the railways on the upper Guyandot with the Logan subdivision of the Chesapeake in the lower valley. Its main functions will be to provide a suitable outlet for westbound traffic, chiefly coal, from the lines of the Virginian and the Chesapeake in the upper valley and to carry the large tonnage of coal and lumber that may be developed tributary to the new line. The construction of the Gilbert-Wharncliffe line will enable the Norfolk to compete with the Chesapeake for westbound traffic originating on the Virginian and will give the latter greater independence in respect of such shipments.

The construction of the line of the Virginian from the upper Guyandot to a connection with the Chesapeake at Gilbert would immensely improve the position of the latter in respect of the westbound movement of coal originating on the Virginian. It is also plain, indeed so obvious as scarcely to require statement, that the construction of the Gilbert-Wharncliffe connection is necessary in order to enable the Norfolk to continue, on conditions that are tolerable, to compete with the Chesapeake for that traffic. The construction of that connection cannot reasonably be regarded as an intrusion by the Norfolk into territory already being well-served by the Chesapeake. On the contrary the Norfolk already hauls about four-fifths of the Virginian's westbound coal. By this relatively short connection, it will be able to give a better outlet for that traffic, to make substantial saving in the cost of handling, and to remain in position, at relatively slight disadvantage, to compete for traffic in which it long has had a large share. And shippers will have the benefit of such competitive service.

But the Chesapeake insists that under the Transportation Act the Commission may not authorize new construction for the purpose of continuing such competition.

The Act cannot reasonably be so construed.

Section 1 (18) provides (Tit. 49, U. S. C.):

> "No carrier by railroad . . . shall undertake the extension of its line of railroad, or the construction of a new line of railroad, . . . unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the . . . construction and operation, of such additional or extended line of railroad. . . ."

Section 1 (20) provides:

> "The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion . . . of a line of railroad, or extension thereof, described in the application . . . and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. . . ."

There is no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity require the proposed construction. Under the Act it was the duty of the Commission to find the facts and, in the exercise of a reasonable judgment, to determine that question. *Texas & Pac. Ry. v. Gulf, etc. Ry.*, 270 U. S. 266, 273.

Undoubtedly the purpose of these provisions is to enable the Commission, in the interest of the public, to prevent improvident and unnecessary expenditures for the construction and operation of lines not needed to insure adequate service. In the absence of a plain declaration to that effect, it would be unreasonable to hold that Congress did not intend to empower the Commission to authorize construction of new lines to provide for shippers such competing service as it should find to be convenient or necessary in the public interest. Indeed § 5 (4) of the Act, authorizing the Commission to adopt a plan for the consolidation of railway properties into a limited number of systems, clearly discloses a policy on the part of Congress to preserve competition among carriers. It provides: "In the division of such railways into such systems under

such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained." And the Commission has recognized the advantages of competitive service to shippers especially in respect of a diversified car supply for the shipment of coal and lumber; it suggests the possibility of failure of operation from various causes, that under some circumstances competition operates to stimulate better service and that reasonable competition may be in the public interest. *Construction of Lines in Eastern Oregon,* 111 I. C. C. 3, 37. *Construction of Line by Wenatchee Southern Ry.,* 90 I. C. C. 237, 257.

The facts stated in the report are sustained by the evidence and, under the Act, they are plainly sufficient to support the order.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.